No. 336.

Brief of M. M. Crane for Appt.

SEP 28 1897

JAMES H. McKENNEY

Filed Sept. 24, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

NO. 336.

JOHN W. BAKER, SHERIFF OF McLENNAN COUNTY, TEXAS, APPELLANT,

vs.

WILLIAM ORICE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLANT.

M. M. CRANE,
Att'y for John W. Baker, sheriff, etc., appellant.

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STATEMENT OF THE CASE.

The appellee was jointly indicted with one Hathaway and thirteen others, in the District Court of McLennan County, Texas, for a violation of the anti-trust law of that State. The indictment was found at the November term, 1894. (Record p. 8.) The charge was a felony. On the 9th day of December, 1896, he applied to the Circuit Court of the United States for the Northern District of Texas for a writ of *habeas corpus*, in which he stated, in substance, that the Texas statute upon which the indictment was based was void. (1.) Because it conflicted with the fourteenth amendment to the Federal Constitution, by denying to all persons equality before the law. (Record pp. 2-8, inc.) (2.) That it was intended to operate beyond the territorial limits of the State and was a restriction on interstate commerce.

In addition to these material allegations, it was also stated that the case of the appellee and the others who had been jointly indicted with him who had been arrested, was called for trial in said court on the second day of December, 1895, and that under the provisions of the Texas Code of Criminal Procedure, a severance was had, and Hathaway was alone put upon trial. (Record p. 3.) The application set out at great length the proceedings had at that trial including the motion to quash the indictment, based, among other things, upon the ground that the act under which he was indicted was void for the reason set up in the application, viz., that it conflicted with the fourteenth amendment to the Federal Constitution. It alleged that this motion was overruled. That the trial resulted in a verdict of guilty against Hathaway. His punishment was assessed at a fine of $50.00; that his motion for a new trial was overruled, and he appealed to the Court of Criminal Appeals of Texas. That he was compelled to remain in jail several months during the time his appeal was pending in the State court. That notwithstanding the fact that a fine was the only punishment assessed against him, under the laws of Texas it operated as a conviction of a felony. That his case was reversed and remanded to the trial court, the Court of Appeals holding the evidence against him insufficient, the court failing to pass on the constitutional question.

The application also stated that since Hathaway's case was reversed by the court of last resort in Texas, "and while the petitioner and his codefendants, who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial nor has said cause been set for trial but the same has been permitted to remain upon the docket of said court subjecting this petitioner and his codefendants not only to the shame and contumely of an indictment for felony, but denying to himself and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner and his codefendants are without remedy in the State Courts of Texas for the assertion and vindication of their rights under the constitution of the United States."

It further alleged that on the 24th day of November, 1896,

Hathaway applied to the Circuit Court of the United States for the Northern District of Texas for a writ of *habeas corpus*, and that the writ was granted and made returnable on the same day. That a hearing on said application for said writ of *habeas corpus* was set for the 7th day of December, 1896. That on the said 7th day of December, 1896, the case against Hathaway was dismissed in the State court. It was charged that this was done for the purpose of preventing the Federal Court from passing upon the constitutional rights of Hathaway.

Attached to this application was a copy of the indictment in the State court, together with a purported copy of the speech of the prosecuting officer in the trial of Hathaway, the brief of counsel who appealed Hathaway's case to the Court of Criminal Appeals, and much other irrelevant matter. (Record pp. 8-65 inc.)

Upon this application the court directed a writ of *habeas corpus* to be issued as prayed for. It was made returnable to the court at Waco, Texas. (Record p. 65.) The writ was issued, upon which the appellant, John W. Baker, Sheriff of McLennan County, made his return in substance that he had thereby produced the body of appellee in open court, and that he held him by virtue of a capias issued out of the District Court of the 54th Judicial District of the State of Texas, upon an indictment preferred in said court against said appellee and others in a certain criminal case numbered and entitled 871, the State of Texas v. John D. Rockefeller et al.; said appellee having been charged with being engaged with others in a conspiracy against trade, in violation of an act of the Legislature, described as the Act of 1889. (Record p. 66.)

The appellee was admitted to bail in the sum of one thousand dollars. (Record p. 67.)

On the 11th day of December, 1896, the case was transferred to the branch of the same court at Dallas, Texas, for trial, and was set down for January 11, 1897. (Record p. 68.)

On January 11, 1897, appellant, John W. Baker, sheriff, etc., filed an amended return, which stated substantially:

1. That he produced in open court as directed by the writ of *habeas corpus* the body of appellee. That heheld him by virtue of a capias issued out of the 54th Judicial District of the

State of Texas, upon an indictment preferred in said court in cause No. 871, entitled the State of Texas v. John D. Rockefeller et al; said appellee being charged by indictment, with others, with having engaged in a conspiracy against trade, in violation of an act of the Legislature of the State of Texas, entitled "An act to define trusts and to provide the penalties and punishment of corporations, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889.

2. That the authorities of the State of Texas have been vigilant and diligent in the discharge of their respective duties towards the relator and his codefendants. That said authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore mentioned, a speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own (relator and his codefendants) seeking, and by virtue of their own acts; that the call docket of the district court records of the 54th Judicial District of the State of Texas where said indictment is pending, show that at the first term of said court after said indictment was presented, said cause was set down for trial on March 14th. That upon the call of said docket for trial, it was continued by agreement between the State and the defendants. That at the succeeding September term the case was set down for trial on October 4th. But that on the call of the same for trial on that day it was continued upon motion of the defendants. That it was again set down for the November term, to be tried on the 2nd day of December, 1895; that when the cause was called for trial, the defendants, including the relator, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein. For the verification of the foregoing statements, reference was made to the certified copy of the records of the 54th Judicial District of the State of Texas, marked "Exhibit A," and attached thereto.

3. Respondent further alleged that he was informed and believed, and so charged, that the avowed purpose of the relator and his codefendants was to delay, if possible to defeat, the

jurisdiction of the courts of Texas in the administration of its laws, which he and his codefendants were charged with having violated. That in pursuance of said purpose, the relator and his codefendants had plotted and concocted a set of facts and circumstances for the express object of appealing to that judicial discretion lodged in that court for granting writs of *habeas corpus;* that this relator and his codefendants had conspired among themselves to have their several sureties to surrender them into his (meaning the sheriff's) lawful custody, as sheriff of McLennan County, Texas. That by their own acts and at their own request, and by their own procurement, the sureties of relator and his codefendants did surrender them, and that on the very day of the surrender of this relator, contemporaneously with the surrender, and in obedience to the petition of relator, a writ of *habeas corpus* issued out of that court, and was served upon him as sheriff of McLennan County, commanding him to produce before the court instanter the body of relator, held in his lawful custody.

To verify which the affidavits of the sureties of relator and his codefendants, marked "Exhibit B," were attached to said return and made a part thereof, by agreement with counsel of relator, in lieu of the evidence of said sureties before that court. This return of the sheriff was served by him officially as sheriff of McLennan County, Texas. (Record, pp. 68-70.)

Exhibit A attached to this return consisted of a certificate of the clerk of the District Court, being the court in which the indictment was pending, to the effect that at the March term, 1895, of that court, the following order was entered by the District Judge: "Set for May 14th. Continued by consent."

For the September term, 1895, the following entry of the District Judge was made: "October 4th. Continued by defendants, and case set for December 2nd."

For the November term, the following entry was made: "December 2nd, defendants sever, and E. T. Hathaway upon trial first."

For the March term, 1896, the following entry was made: "Appealed as to Hathaway."

For the September term, 1896, the following is a true and correct copy: "Passed."

For the November term, 1896, the following entry was made: "December 7th, this cause dismissed as to defendant E. T. Hathaway by County Attorney." (Record, p. 70.)

Exhibit B consisted of the affidavits of Charles Banister and N. S. Hill. Banister testified that he was a surety for Grice and Austin and Finley, in the case heretofore mentioned. That on December 9th, 1896, D. C. Bolinger, Esq., of the late firm of Clark & Bolinger, came to him and told him that he wanted him to surrender Grice. That at the request of Bolinger, he went to the office of Clark & Bolinger, and met the appellees Grice and Austin, and accompanied them to the office of the sheriff of McLennan County, where he surrendered them about 2:30 p. m., December 9th, 1896, to John W. Baker, sheriff of McLennan County, Texas. That in the forenoon of December 12th, 1896, W. A. Hawkins, one of the defendants in said cause, requested him to go the office of Clark & Bolinger for the purpose of surrendering Arthur M. Finley, then in the office. That he accompanied Finley to the sheriff's office, where, at the request of Messrs. Clark & Bolinger, he surrendered him, and where, at the same time, N. S. Hill, a surety for W. E. Hawkins, surrendered said Hawkins, all on the morning of December 12th, 1896. (Record, p. 71.)

N. S. Hill's affidavit, constituting the other part of the exhibit, stated that he was formerly a surety on the recognizance of W. E. Hawkins in the cause heretofore mentioned; that he continued as surety for a period of two years, until about the 9th day of December, 1896. That on said day Hawkins came in person to him and stated that his case was to be removed to the Federal Court, and that he wanted to be surrendered to the custody of the sheriff of McLennan County. That at his request he made the surrender on that day. (Record pp. 71-2.)

On the 11th day of January, 1897, appellee filed what he termed a replication, sworn to by himself alone. He demurred to that part of the amended return which stated that the delay in the determination of the indictment against the relator had come in a great part from the relator's own seeking, and by virtue of relator's own acts as was pretended to be shown by the docket entries on the docket of said court.

1. Because said facts were wholly immaterial and irrelevant,

because there was no complaint that there was any delay prior to the conviction of relator's codefendant, Hathaway, which occurred in December, 1895.

2. He demurred to that portion of the return which avers that the relator, in conjunction with his codefendants, had conspired and concocted facts and circumstances for the express object of involving the judicial discretion of the court for granting a writ of *habeas corpus;* and that they had conspired among themselves to have their several sureties surrender them into the hands and custody of the sheriff of McLennan County, Texas, because such facts, if true, did not constitute any justification of the detention of the relator, and furnished no answer to the allegations of the petition of the relator.

3. Because the amended return ought not to have included anything but the true cause of the detention of the relator.

He further answered said return, stating that the relator denied that he and his codefendants and counsel had conspired and confederated as charged in said amended return of the respondent, for the purpose of defeating the jurisdiction of the courts of Texas in the administration of its laws. That for two years he and his codefendants had submitted to the jurisdiction of the courts of Texas for the purpose of trial as aforesaid; and that when it became evident to the relator and his codefendants or relators, that such trial was not to be had except at some indefinite period in the future, if ever, that then the relator, as a citizen of the United States, proceeded to exercise his rights as such citizen, and to call upon the courts of the United States to vindicate his rights, as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purpose as indicated.

This replication was sworn to be true "to the best of his information and belief." (Record, pp. 72-3.)

Upon the issues thus joined the cause proceeded to trial. The relator offered in evidence the several exhibits to his application, hereinbefore mentioned, together with some statistics taken from the Census Reports of the United States, showing the amount and value of the various kinds of farm products raised in the

United States, together with the number of farmers, planters, agricultural laborers, stock raisers, etc. (Record, p. 74.)

On the same point he offered an extract from the report of the Commissioner of Agriculture of the State of Texas.

The respondent read in evidence all of the exhibits attached to his amended return heretofore referred to. Also an admission of the relator in substance and effect that he was out on bail, and not confined in prison until the day the application for *habeas corpus* was made; and that his counsel with his consent requested his sureties to surrender him to respondent, the sheriff of McLennan, County, Texas, in order that the writ of *habeas corpus* might be sued out. (Record, pp. 101-2.)

The court heard the evidence, and on the 22d day of February, 1897, entered an order that for the reasons set out in the opinion filed in said case, that the relator be forever discharged upon the writof *habeas corpus* therein granted, and that he, the said appellee, do have and recover of the respondent all costs, etc. (Record, p. 101.)

In the opinion of the court therewith filed, the court held substantially:

1. That the writ of *habeas corpus* had been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of a trial by the State courts. (Record, pp. 85-6.)

2. That the trial of Hathaway, who had severed from the other defendants, was virtually a trial of the relator. (Record, p. 84.)

3. That the act of the Texas Legislature under which the indictment was found violated the fourteenth amendment to the Federal Constitution, in that it denied to some persons equality before the law. (Record, pp. 89-91, 95-6.)

4. That it was void because in restraint of the personal liberty of a citizen to enter into such contracts as to him might seem fit. (Record, pp. 91-3.)

It hinted that some motive or other than that of the public good inspired the Legislature to pass the law. (Record, p. 100.)

5. That the passage of the law did not involve the exercise a police power of the State; and that the clause exempting agricultural products while in the hands of the person producing

them, and live stock while in the hands of those who raise them, from the operation of the statute, invalidated the entire statute. (Record, pp. 88-9.)

A bill of exceptions covering the various points above mentioned, as well as other matters, was approved and filed.

The statute upon which the prosecution was based and which the Circuit Court declared to be invalid, reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney General or District or County Attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its

charter rights and franchise, and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State; and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis County, in the name of the State of Texas.

"Sec. 5. That the provisions of Chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof, shall be punishedby fine not less than fifty dollars nor more than five thousand dollars,and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belong to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

"Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be com-

mitted or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General or the District or the County Attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

"Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

Approved March 30th, 1889. Acts of 1889, p. 141.

Appellant, on the same day, viz., the 22nd day of February, 1897, applied to the court for an appeal. (Record p. 103.) The appeal was allowed, service of citation on the application therefor having been specially waved. (Record p. 104.)

The appellee entered into a recognizance in the sum of one thousand dollars to await the action of this court. (Record p. 103.)

Appellant gave an appeal bond fixed by the court. (Record p. 104-5.) Appellant filed the following assignments of error in connection with his application for appeal:

"1. The court erred in admitting in evidence over the objection of respondent an extract from the report of the Commissioner of Agriculture Statistics and History of Texas—showing the number of farmers in Texas because the same was incompetent, irrelevant, and for other reasons set forth in the bill of exceptions.

"2. The court erred in admitting in evidence an extract from the report of the census of 1890 and the statistics therein because same was incompetent and not properly authenticated, was irrelevant and immaterial, said extract showing in substance the number of farmers and stock raisers in the United States.

"3. The court erred in holding, in his opinion delivered on the trial, that the writ of *habeas corpus* had been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of the trial by the State court.

"4. The court erred in holding in substance that the trial of Hathaway, who had severed from the other defendants, was virtually the trial of this relator.

"5. The court erred in discharging the prisoner and not remanding him to the State courts for trial in order that he might pursue his legal and orderly remedy so often pointed out by the Supreme Court, viz., a writ or error, in the event the State court should decide against him.

"6. The court erred in holding that the Texas statute under which relator was being prosecuted violated any portion of the Constitution of the United States and denies to any person equality before the law, and that it is in any sense violative of the fourteenth amendment to the Federal Constitution.

"7. The court erred in holding that the statute was void because in restraint of the personal liberty of the citizen to enter into such contracts as to him might seem fit.

"8. The court erred it attributing to the Legislature any motive other than that of the public good in undertaking to prevent agreements in restraint of trade that were hurtful to society.

"9. The court erred in holding in effect that the passage of this law did not involve the exercise of the police power of the State in undertaking to prohibit contracts in restraint of trade, which the experience of generations has proven to be hurtful to the community.

"10. The court erred in holding that the exemption of agricultural products while in the hands of the person producing them, and the exemption of live stock while in the hands of those who raise them, invalidated the statute, because said exemption is such an one as properly addressed itself to the legislative discretion and was not an arbitrary discrimination in favor of or against any class.

"11. The court erred in not holding as a matter of law that the agreements made among producers and those who raise live stock, if any such have been made in restraint of trade, were not injurious to the general public, and therefore this statute exempting them from the penalties was not an arbitrary use of legislative power.

"12. The court erred in *rendering* judgment in favor of the

relator and discharging him from the custody of the respondent. (Record p. 105-6.)

Upon this a writ of error was on the same day issued. (Record p. 106-7.)

It was agreed that the cases of this appellant against F. A. Austin, appellee, and the same appellant against W. E. Hawkins, appellee, and the same appellant against Arthur M. Finley, appellee, would be tried at the same time and on the same date with this case, as the questions involved are identical. (Record p. 108.)

The first and second errors assigned relating to the admission of evidence are hereby waived.

THIRD ASSIGNMENT OF ERROR.

"*The Court erred in holding, in his opinion delivered on the trial, that the writ of habeas corpus has been properly granted, and that the Circuit Court of the United States could properly exercise jurisdiction in this proceeding in advance of the trial by the State courts.*"

FIFTH ASSIGNMENT OF ERROR.

"*The Court erred in discharging the prisoner and not remanding him to the State courts for trial, in order that he might pursue his legal and orderly remedy so often pointed out by the Supreme Court, viz., the writ of error, in the event the State court should decide against him.*"

The above two assignments, relating to practically the same subject, will be considered together. Appellant's proposition under these assignments is that the Circuit Court had no authority to issue a writ of *habeas corpus* in this case, and that therefore the relator should have been remanded to the custody of the Sheriff of McLennan County, Texas, for the reason that this court has by its decisions well settled the general rule to be that ordinarily a writ of *habeas corpus* will not be granted by a Federal court to take a prisoner from a State court before judgment therein—nor even after judgment; but the relator will be left to the more orderly remedy—a writ of error.

Ex parte Royall, 117 U. S., 241, 250-2.
In re Fonda, 117 U. S., 516-8.

In re Wood, 140 U. S., 291.
Cooke v. Hart, 146 U. S., 183.
In re Frederick, 149 U. S., 70.
New York v. Eno, 155 U. S , 89-98.
Pitts v. Kenney, 155 U. S., 100-1.
In re Chapman, 156 U. S., 215.
Benjamin v. Baker, 157 U. S., 655.
In re Belt, 159 U. S., 100.
Whitton v. Tomlinson, 160 U. S., 241-2.
Washington v. Coovert, 164 U. S., 702.

Were it otherwise decided, writs of *habeas corpus* issued by a Federal court would be made to operate as writs of error.
In re Swan, 150 U. S., 648.
In re Tyler, 149 U. S., 164.
New York v. Eno, supra.

The rule is based upon the additional proposition, that State courts are courts of the American Union and should be treated accordingly. It must be presumed that they will protect all of the rights of the applicant, whether given by Federal or State law.
Robb v. Connerly, 111 U. S., 624.

Appellant concedes that there are exceptions to the general rule above announced. These exceptions had been stated in a general way, but were summarized in the case of Whitton v. Tomlinson. In that case the general proposition above made was announced, but it was also stated, as it had been frequently done before, that in certain exceptional cases the writ might be granted. In discussing this question, the court used the following language:

"In ex parte Royall and in New York v. Eno, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*.

"Such an exceptional case was In re Neagle, 136 U. S., 1, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protect-

ing a judge of the court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a State on a charge of homicide committed in the performance of that duty.

"Such also was In re Loney, 134 U. S., 372, in which a person arrested by order of a magistrate of a State, for perjury in testimony given in the case of a contested Congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted by the State courts would greatly impede and embarrass the administration of justice in a national tribunal.

"Such, again, was Wildenhus's case, 120 U. S., 1, in which the question was decided on *habeas corpus* whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

"*But except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State;* and even after such final determination in those courts, will generally leave the petitioner to the *usual* and *orderly* course of proceeding by *writ of error* from this court." (Italics mine.) Whitton v. Tomlinson, 160 U. S., 241-2.

This case seems to have been reaffirmed in the case of Washington v. Coovert, 164 U. S., 702.

I understand the case of Whitton v. Tomlinson to mean that the circuit courts have no right, under the laws of the United States, to issue writs of *habeas corpus* except in such *peculiar* and *urgent* cases as were therein stated. For instance, as in the Neagle case, where an officer had been designated to execute a Federal law by protecting one of the judges of the Supreme Court; and in the discharge of the duty assigned him, he did an act which was deemed to be a violation of the State law, though conceded to be in strict line of his duty pointed out by the Federal statutes. This court held that it must protect him, or else it would be impotent to execute the Federal laws.

In the Loney case, the court sought to protect a witness against prosecution in a State court for perjury on account of testimony given in a congressional contest, holding in effect that the Federal courts must execute the Federal laws and protect those who are seeking so to do. A different construction would have

greatly impaired and embarrassed the administration of justice. The charge of perjury in that class of cases was within the exclusive jurisdiction and cognizance of the Federal courts.

So in the Wildenhus case. In order to enforce the stipulations of a treaty between the United States and another nation, a Federal court interfered to take away from a State court one of the crew of a foreign merchant vessel charged with the commission of a crime on board a merchant vessel while within a port of the State.

It certainly cannot be said that the case at bar literally falls within any of the exceptions pointed out by this court. Nor can it be said to be one "of such peculiar and urgent cases" as to be exempt from the general rule so well established.

The court below, as well as appellee, seemed to think that this case constituted an exception to the general rule for the following reasons:

1st. Because Hathaway, a co-defendant of appellee, was tried in a State court and the court failed to quash the indictment against him on account of the constitutional objections urged in this case.

2nd. That he was compelled by the laws of Texas to remain in jail while his appeal was pending.

3rd. That the Texas Court of Criminal Appeals failed to pass upon the constitutionality of the statute in question, but contented itself with ascertaining that the evidence was insufficient to justify a conviction.

4th. Because the State court permitted the prosecution against Hathaway to be dismissed after his writ of *habeas corpus* had been granted by the Circuit Court of the United States.

5th. Because a speedy trial was denied to appellee by the State court.

The first four reasons should be brushed aside. The trial of Hathaway was not in any sense the trial of appellee. Where two or more persons are charged in the same indictment with the commission of an offense, the Texas Code of Procedure permits a severance. Art. 706 of the Code of Criminal Procedure reads as follows:

"When two or more defendants are jointly prosecuted, they may sever on the trial upon the request of either."

Art. 708 provides:

"When a severance is obtained the defendants may agree upon the order in which they are to be tried. But in case of their failure to agree, the court shall direct the order of trial.

It is perfectly obvious that when a severance is had, and one of the parties put upon trial, that the others are not tried until the first trial is concluded. It is likewise plain that the result of the first trial can in no wise affect the subsequent trials. It may be that evidence will be offered in the first that will be omitted in any subsequent proceeding. It may be that the ruling of the court will in one be essentially different from that of the other. The truth of these observations is demonstrated by this case. Hathaway was put on trial, and he was convicted. It could not be stated that appellee was convicted. It could not be stated that appellee was kept in jail awaiting the result of Hathaway's appeal. They are two different persons. The one has no more interest in the other's trial than if they had been indicted for the same offense in different indictments. Appellee has no legal grievance because of what was done to Hathaway. Each case must stand on its own merits. And if anything occurred to justify the suing out of a writ of *habeas corpus* by appellee, it must have occurred in his case and not in that of some other person. Because if Hathaway had been acquitted, it would not have profited appellee, because Hathaway might have been acquitted, and appelle convicted. That frequently happens.

As to the fact that Hathaway was compelled to remain in jail pending his appeal, that is a matter over which the State has exclusive control. It has a right to say whether its prisoners convicted of a felony shall remain in jail, or shall be enlarged on bond. No branch of the Federal government, its executive, legislative or judicial, has ever presumed to dictate to any State on questions of that character. The law requiring a prisoner to be kept in jail pending his appeal, after a conviction for felony, violates no part of the Constitution of the United States.

The court below seem to put a good deal of stress upon the fact that the Court of Criminal Appeals failed to pass upon the constitutionality of the statute in the Hathaway case. It ought to be sufficient to say that no court is compelled to decide any

more than enough to dispose of the particular case in hand. The Texas Court of Criminal Appeals found that there was not sufficient evidence against Hathaway to justify his conviction. As to whether there is sufficient against the appellee in this case is yet to be determined. Having found that the evidence against Hathaway was insufficient, the case was reversed, without reference to the constitutionality of the statute, though the court intimated that it might follow the decision of the Supreme Court of the State. I know of no provision by which a court of last resort can be compelled to decide every question in a case. Counsel for appellee in seeking to have a rule of that kind established are struggling after the unattainable. It is not always proper for a court to determine more than enough to dispose of the particular controversy. Sometimes, considered from some standpoints, it is very desirable that every question raised in a case should be settled. The courts themselves must determine when that course is necessary. Certainly there is no power in a Federal court to compel a State court to decide any question in any case before it. Nor is there any power in a State court to compel a Federal court to determine any question involved in a case of which it has jurisdiction. It is a monstrous proposition to assert that the Circuit Court of the United States is clothed with authority to take away from a State court a prisoner of which the State court has jurisdiction, and of whom the State authorities have the custody, for the reason that the courts of the State failed to pass upon every question which the Circuit Court thought was involved in the record of some other case. If that doctrine prevails, then the Circuit Courts of the United States have the power, and it is their duty, to exercise a sort of surveillance over the Supreme Courts of the States, and indicate to them what questions it is necessary for them to decide in each case, or else it will take the prisoner from their jurisdiction and pass upon the questions themselves which they suppose are involved.

The absurdity of that proposition as applied to this case is apparent. It is not Hathaway himself seeking a writ of *habeas corpus* because the Court of Criminal Appeals did not deem it necessary to pass upon the constitutionality of the statute under which he was charged; but it is a codefendant of his complain-

ing because a court of last resort in Texas failed to discharge a supposed duty to Hathaway, which he and his counsel believe was incumbent upon that learned tribunal. Appellee is not complaining because the Court of Criminal Appeals failed to perform its duty to him, but because it failed in its duty to another. In other words, his proposition is, broadly stated, that because the court of last resort in Texas did not see fit to decide the constitutionality of a question in Hathaway's case, that therefore the Circuit Court of the United States ought not to permit this appellee to be submitted to the jurisdiction of that court. How does appellee know that he will not be acquitted in the State court? If he should be acquitted he will have no reason to test the validity of the law.

Then, on the other hand, the appellee complains because Hathaway's case was dismissed after his writ of *habeas corpus* was sued out. It is proper here to state, though the record may not disclose the fact, that Hathaway's case was not dismissed by any of the counsel in this case. That action was taken by Mr. Taylor, then County Attorney of McLennan County, whose alleged speech in the Hathaway case has been so kindly put in the record by counsel for the appellee. He had abundant authority to dismiss the case. It may be found in the following articles of the Texas Code of Criminal Procedure. Art. 709 of that Code reads as follows:

"The attorney representing the State may *at any time*, under the rules provided in article 37, dismiss a prosecution as to one or more defendants jointly indicted with others, and the person so discharged may be introduced as a witness by either party."

Article 37, to which reference is made, reads as follows:

"The District or County Attorney shall not dismiss a case unless he shall file a written statement with the papers in the case, setting out his reasons for such dismissal, which reasons shall be incorporated in the judgment of dismissal, and no case shall be dismissed without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to authorize such dismissal."

Article 710 of the same Code, adds:

"When it is apparent that there is no evidence against a defendant in any case where he is jointly prosecuted with others, the jury may be directed to find a verdict as to such defendant, and if they acquit he may be used as a witness in the case."

The Court of Criminal Appeals had held that there was not sufficient evidence against Hathaway to justify his conviction. The statute under which the County Attorney was operating authorized him in that event to dismiss as to Hathaway at any time. A special verdict in his favor might have been found pending the trial of the others. If "under the law" the County Attorney of McLennan County had the right *at any time* to dismiss the proceeding against Hathaway it is a little singular that the contention should now be made that he had no right to dismiss that case after Hathaway had sued out a writ of *habeas corpus* in the Federal court. Why should the suing out of the writ of *habeas corpus* deprive the County Attorney of the power with which the law had clothed him? When Hathaway's case was dismissed the basis of his complaint was gone. There being no further criminal prosecution pending against him, there was no occasion for his having a writ of *habeas corpus* issued. If Hathaway is now without a complaint, how ridiculous does it appear for the appellee in this case to enter his protest. He objected because Hathaway was charged with a crime, because of the manner of conducting his trial, the admission of the testimony, the address of the prosecuting attorney, the charge of the court—indeed to everything that was done on the Hathaway trial. He likewise objected to his conviction. He objected to his having to remain in jail pending his appeal, and finally because the Court of last resort in Texas did not decide every question involved in that case, and even objected when the Texas courts undertook to dismiss all criminal charges against Hathaway, and was so angered that he straightway went and put himself in the custody of the sheriff, that he might sue out a writ of *habeas corpus*. The prosecution against Hathaway was dismissed on the 7th of December, 1896, and on the 9th day of December, 1896, appellee sued out his writ of *habeas corpus*. (Record pp. .)

In this connection the trial judge indulged in some criticism to the effect that it took a long time for the State court to ascertain that there was not sufficient evidence against Hathaway. That criticism is strangely out of place in a judicial decision. The records of this court and of all other courts of last resort will show that felony cases have, in numerous instances, been

reversed for the reason that the evidence was insufficient to sustain a conviction. But it has rarely ever been intimated that because a trial court differed from a court of last resort as to the sufficiency of the evidence to sustain a conviction, that it was inspired by any other motive than an earnest purpose of enforcing the law. I have no desire to indulge in any criticism of the judge before whom this proceeding was tried, further than to say that there was nothing in the record before him to justify his animadversions on the courts of the State, or the suggestion that they were animated by anything else than a desire to do justice, nor is there anything outside of the record to justify his inferences. Indeed there is nothing in the record to indicate that Hathaway ever sought to secure an earlier trial, or that he endeavored to have his case dismissed at any earlier date. Furthermore, there is nothing in the record to indicate that appellee in this case, or his associates and codefendants sought to have the Hathaway case dismissed, or sought to have an order entered therein setting it down for trial at an earlier date. Nor is there anything in this record, except the inference to be drawn from the application of appellee for a writ of *habeas corpus*, that he ever sought to have his own case set down and tried. If writs of *habeas corpus* can be granted by Federal courts on inferences to be drawn from such allegations as are contained in appellee's application for a writ of *habeas corpus* in this case, it will be a great inducement to those who are seeking to delay prosecutions in the State courts to apply to the Federal courts for such writs. An unseemly struggle will be going on at all times as to which court shall have jurisdiction of the particular prisoner who is charged with an infraction of the law. But if the Federal courts and State courts each recognize the proper limits of their authority, they will move along together as harmonious parts of the same system, each of which is indispensable in its sphere to the execution of the laws of this great country. Against this unseemly struggle, and in favor of the harmonious action of the courts of this union this appeal is being prosecuted, and this argument is made.

As before suggested the contention that a speedy trial was denied appellee cannot be maintained. That charge, if made at

all in the application for a writ of *habeas corpus*, is made in the following paragraph of appellee's application:

"Your petitioner further shows that since the rendition of said judgment by said Court of Criminal Appeals (meaning the Hathaway case) two terms of said District Court of the 54th Judicial District have been held, one of which is now nearing its close; and while this petitioner, together with his codefendants who have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants not only to the shame and contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner as well as his codefendants are without a remedy in the State courts of Texas for the assertion and vindication of their rights under the Constitution of the United States. (Record, p. 5.)

It will be noted that the points in the allegation on that paragraph made are as follows:

1. That but *two* terms of court had been held in McLennan County since the decision in the Hathaway case was rendered by the Court of Criminal Appeals.

2. That appellee and his codefendants stood ready and anxious for trial upon said indictment, but that said cause had not even been called by the court for trial, nor had it been set for trial. But no affirmative allegation was made that appellee or any of his codefendants at any time *applied to the court for a trial*, or had *asked to have the case set down so that it might be tried*. Indeed, so far as the allegations in the appellee's application are concerned, it might well be presumed that the cases had never been *regularly reached* upon the trial docket, and if reached, that they were passed for some reason satisfactory to the court and to the parties. That paragraph was answered by the respondent, appellant in this court, in the following language:

"Responding further, I would respectfully show to the court that the authorities of the State of Texas have at all times been vigilant and diligent in the discharge of their respective duties towards this relator and his codefendants. That *said authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore*

mentioned that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come *in a great part of their own seeking*, and by virtue of their own acts. That the call docket of the District Court records of the 54th Judicial District of the State of Texas where said indictment is pending shows that at the first term of said court after said indictment was presented, said cause was set down for trial on March 14th; that upon the call of said docket for trial, it was continued by agreement between the State and the defendants. That at the succeeding September term, the cause was set down for October 4th; but on the call of same for trial on that day, was continued upon motion of the defendants. That it was again set down for the November term to be tried on the 2nd day of December, 1895; that when the case was called the defendants, including relator, claimed a severance, to which they were entitled under the laws of Texas, and forced the State to try Hathaway alone, thereby avoiding and defeating the trial of relator herein." (Record p. 69.)

It will thus be seen that there is a substantial denial in this return of the inference to be drawn from appellee's allegation. The distinct statement is made in the return that the State authorities have been anxious and ready to accord to all of the defendants under the indictment heretofore mentioned *that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas.* And that the delay in the determination of the indictment against them has come in *a great part of their own seeking* and *by virtue of their own acts.* It has been determined by this court that the return of a sheriff imports absolute verity on its face:

Crowley v. Christensen, 137 U. S., 86–94.

Applying that rule to this case, it must be held that the denial by appellant in his return of the material allegations made by appellee in his application is a complete refutation thereof.

It may be insisted, however, that the return of the sheriff was controverted, and therefore, that it does not import absolute verity on its face. If controverted it must have been by the replication of appellee. So much of that replication as is applicable to the point under discussion may be found in the following quotation, which is a part of the demurrer in which it was stated that the allegations of delay caused by defendant were irrelevant, as well as the entries on the court docket; the alleged reason was—

"There being no complaint on the part of this relator of any delay in the trial of said indictment in said District Court of McLennan County prior to the conviction of this relator's co-defendant, Hathaway, which occurred in December, 1895." (Record, p. 72.)

The affirmative allegation made in the replication is as follows:

"This relator says that for two years this relator and his codefendants have submitted to the jurisdiction of the courts of Texas for the purpose of trial as aforesaid, and when it became evident to this relator and his codefendants or corelators herein that said trial was not to be had except at some indefinite period in the future, if ever, then this relator, as a citizen of the United States, proceeded to exercise his rights as such citizen, and to call upon the courts of the United States to vindicate his rights as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of the State courts of Texas, but for the purpose indicated. All of which this defendant is ready to verify." (Record, p. 73.)

It will be noted that in this paragraph there is no definite denial of the allegations made by appellant in his return, found on page 69 of the record, to this effect:

"That said authorities (meaning the State authorities) have been anxious and ready to accord all of the defendants, under the indictment heretofore mentioned, that speedy trial which they were guaranteed under the Constitution and laws of the State of Texas. That the delay in the determination of the indictment against them has come in a great part of their own seeking, and by virtue of their own acts."

A denial of this allegation seems to have been studiously avoided. Nor is there any direct statement that the appellee or his codefendants attempted to procure a trial of their cases in the State courts before this writ of *habeas corpus* was sued out. They announced that they were ready for trial, but did they enter court and ask for trial, or did they not acquiesce in the delay which was had? The record contains no affirmative allegation that they sought a trial or even sought to have their case set down for trial.

It will be noted that the return of appellant on the writ of *habeas corpus* was not controverted, even by the so-called replication of appellee. But it is submitted that when the court held that the return of a sheriff imports absolute verity on its face unless controverted, it meant that unless controverted by

evidence *aliundi*. In other words, if the applicant should make certain allegations in his petition for writ of *habeas corpus*, and those allegations were denied by the sheriff in his return, no strength could be added to the averment in the petition by a replication sworn to by the applicant only, which restated substantially the same matters as those contained in the petition for writ of *habeas corpus*.

This must be the rule, or otherwise by twice swearing to substantially the same facts, the petitioner is able to destroy the return of the sheriff. The trial of a perjury case may serve to illustrate the point. Most of the States require a charge of perjury to be made out by the testimony of two witnesses, or by one witness and circumstances corroborative in character, equivalent to the testimony of a second witness. This rule cannot be complied with except by the production of the two witnesses, or the one witness and the necessary corroborative circumstances. The mere fact that one witness may twice testify to the same facts will not add any additional force to his testimony. I submit that the rules applicable to *habeas corpus* cases ought to be similarly construed. The application is sworn to. It is controverted by the return of the sheriff. If the applicant desires to destroy the effect which the allegations in the return will have, it must be done by evidence *aliundi*, but certainly not by reswearing himself to the same facts contained in his petition.

But whichever view of the case may be taken, the return of the sheriff was not in this case controverted, as to the main points upon which this application was based; unless inferences and suspicions be indulged in. It devolved upon the appellee in seeking this extraordinary remedy to show by clear and apt averments, and by substantial proof, the existence of the conditions which would constitute this a "peculiar and urgent case," entitling him to a writ of *habeas corpus* before judgment in the State court. There is nothing in the case to bring it within the exceptions pointed out by the court.

The additional circumstance which ought to destroy the application is that the appellee was out on bond, and that he voluntarily procured his surrender into the hands of the sheriff *in order that this proceeding might be brought*. The appellee ad-

mitted in the court below that he was out on bail, and not confined in prison, until the day the application for *habeas corpus* was made; and that his counsel, *with his consent*, requested his sureties to surrender him to respondent, the sheriff of McLennan County, Texas, *in order that the writ of habeas corpus might be sued out.* (Rec., p. 102, sub. 8.)

The records of judicial tribunals may be searched in vain for another instance where the defendant in a State court has voluntarily surrendered himself into the actual custody of the officers, instead of remaining at large upon his bond, in order that he might sue out a writ of *habeas corpus* in a Federal court, and thus impede and obstruct the procedure of the State courts, and then claim that his was a *peculiar* and *urgent* case, that did not come within the operation of the general rules so clearly laid down by this court. The appellee should have been left by the Circuit Court where he had voluntarily placed himself; and the Circuit Court erred in interfering with the administration of justice in a State tribunal, when that interference was sought under such circumstances as the record discloses in this case. It was a most flagrant abuse of that judicial discretion with which the court was clothed.

The conflict of jurisdiction between the State and Federal Courts should always be avoided when possible. As this court has many times stated, "State courts are courts of the Union, and they are under as much obligation to enforce the rights of persons, whether based upon the Federal or State Constitutions, as this court can be. Any conflict between the two is unseemly and should be avoided." I submit, therefore, that the exceptions stated in the case of Whitton v. Tomlinson should be adhered to, and that the Federal trial court should not be permitted to assume jurisdiction except in the extraordinary cases therein pointed out, in which no other adequate remedy can be obtained.

It is respectfully submitted that no writ of habeas corpus should have been granted by the Circuit Court of the United States where the party suing out such writ voluntarily surrendered himself into custody for that purpose.

That the appellee in this case did voluntarily surrender him-

self for the purpose stated was admitted in open court. (Subd. 8, Bills of Exception, Record p. 102.)

Republica v. Arnold, 3 Yates, (Pa.,) 263.

Wales v. Whitney, 114 U. S., 564.

6 Mart., (La.,) 569.

It is not denied that the sureties would have a right to surrender the prisoner at any time; but their right to deliver him into the custody of the sheriff, and the fact of his actual delivery, are two different propositions. The difference between the right to the possession of a piece of property, and its actual possession are too plain to admit of discussion. It is a fiction of law to say that appellee was in the custody of his sureties. That means that they had the right to put him in the custody of officers by withdrawing from the contract which they had made with the State to be surety for his appearance into court. But while he is out on bond, he is absolutely free; he is under no actual restraint; and when he surrenders himself into the actual custody of the officers for the *purpose of complaining of that custody*, he is performing an act that he has no right to perform, and one which the writ of *habeas corpus* was never designed to remedy. The writ of *habeas corpus*, I submit, is only to prevent involuntary servitude or involuntary confinement. It was not intended to take the hermit from his cell, or the student from his cloister; nor was it intended to take one from prison, who voluntarily sought imprisonment in order that he might invoke the remedy not for the purpose of securing his freedom—but to take the opinion of this court as to the validity of a statute. The case ought to be regarded in a sense as a fictitious one, instituted for the purpose of testing the validity of the anti-trust statute of Texas, and not in that good faith which the law requires in order to secure a judicial decision. In other words, the time of this court is being taken up by a case the necessity for which never arose. This man was indicted in a State court for the violation of a State statute. He was not in prison except by his own procurement. It is a travesty on justice to say that he was not only entitled to the writ issued by the court that had jurisdiction of him and his case but by the Federal trial court—a court of no greater dignity than the one in which he stood indicted.

Is it not a travesty on justice to say this man who went into voluntary confinement should be entitled to this extraordinary remedy, this forcible interference with a court of equal dignity —a court of the same country—a remedy not allowed except in cases of "peculiar urgency?" Peculiar urgency indeed! There is no urgency in it, peculiar or otherwise. The methods of getting into this court are certainly peculiar. The time of the Circuit Court and of this court, which ought to be devoted to causes pressing for a hearing, must needs be consumed by this man, who rushed into prison in order that he might get this court to determine whether a certain State statute is valid and in the meantime delay all further proceedings by the State court.

Such ingenuity should not be encouraged, nor should this court reward the exercise of such inventive genius.

The appellee's appeal to the Federal court was inspired by a disposition to belittle the State courts. That spirit should not be encouraged. The State and Federal courts are courts of one common country—of a union "indivisible." He who seeks to array the one against the other should receive no encouragement from either.

Is the statute in question void because in restraint of the personal liberty of the citizen to enter into such contracts as to him might seem fit?

The court below held that it was, and made copious quotations from various authorities to establish that proposition. Among these was one from Berthoff v. O'Reilly, 74 New York, 415. The quotation is in the following language: "Liberty in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will to earn his livelihood in any lawful calling, and to pursue any *lawful* trade or avocation." The proposition announced in that case is conceded to be correct. That a citizen has a right to engage in any LAWFUL trade or avocation is self-evident, but the question is, who has the right to determine what is a *lawful* trade or avocation and what is unlawful. This is the material question in this case. The proposition of the trial court is that it is for the court to determine what busi-

ness may or may not be restrained. In other words, the judiciary has a right to settle that question independent of the legislature. To support that proposition the case of J. W. & W. Company v. Jacksonville, 67 Ill., 37, and Ieck v. Anderson, 57 Cal., 251, have been cited. They fail to support the proposition so broadly made by the court. The Illinois case has no application whatever. The court there held that an ordinance of a city which required a railroad company to keep a man by day and a red lantern by night at a certain street crossing where the company had only a single track and where only its usual trains passed, was unreasonable, and particularly as it did not appear that such crossing was unusually dangerous or even more so than the ordinary crossing. The powers of the city conferred on it by its charter were not disclosed in that case, but the decision seemed to be based upon the fact that the ordinance applied to one crossing, but only one. If the ordinance had been general in its terms and applied to all crossings, the question might have been presented as to whether or not the city had the right to make the regulations as to all crossings, but as the case was made that question was not involved.

The application of the California case is not apparent. In it the court held that property could not be confiscated without judicial hearing and judgment after due notice, because confiscation without such hearing was void. Our Texas Supreme Court has several times concurred in that proposition.

The case of Lake View v. Cemetery Company was cited by the court, but it does not support the proposition in its entirety though some of the expressions of the majority of the court tend in that direction. The opposite of the view is clearly stated by the dissenting minority of that court speaking through Mr. Justice Sheldon. Discussing this point, he said:

"Is it for a court to throw itself across the path of the law making power, and annul its enactment made for the welfare of an unexpected populous community, because, in the opinion of the court, it was uncalled for by a sufficient public exigency? In Coates v. The Mayor, supra (7 Cowen, 584), in passing upon this question the court says: 'It is of the nature of legislative bodies to judge of the exigency upon which their laws are founded.' This is believed to be the well settled doctrine upon the subject: that whether there was a sufficient occasion for the exercise of the police power in any given case, is not a judicial

question, but a political question, provided the exercise of the police power be not colorable." Lake View v. Rose Hill Cemetery Co. 70 Ill., 201.

In that opinion, the Chief Justice of the Supreme Court of that State, with Mr. Justice Craig, concurred.

Mr. Cooley states the rule as follows:

"Every person *sui juris* has a right to make use of his liberty in any lawful employment in his own behalf, or to hire it out for the service of others. *The State must always be at liberty to determine what are lawful employments, and to make others unlawful by prohibiting them.* The authority to regulate business embraces every class and variety of occupation, *and may be exercised either in respect to the person who may be employed in the business, or as to the methods in which the business may be conducted.*" Cooley's Elements of Torts, p. 99.

This language was used with reference to the power of a legislature, because it was the legislature that the distinguished author assumed to be the branch of government which had the power to make the regulations in respect to the several callings.

Mr. Teidman, in his excellent work, from which the trial judge made numerous quotations, discusses this question at length, as to whether the power is lodged in the legislature or in the courts to determine when the police regulations are necessary. In his discussion he says:

"Where can these limitations be found (that is the limitation upon the exercise of police power), and in what do they consist? The legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power. . . . . Whenever an act of a legislature contravenes a constitutional provision it is void, and it is the duty of the courts so to declare it, and refuse to enforce it. But is it in the power of the judiciary to declare an act of the legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition? Several eminent judges have more or less strongly insisted upon the doctrine that the authority of the legislature is absolute in those cases in which the Constitution fails to impose a restriction." Teidman's Lim. Pol. Powers, p. 5.

Then, after citing several opinions of distinguished judges, the learned author concluded:

"But notwithstanding the opinions of these eminently respectable judges, the current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limit of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice." Tiedman's Lim. Pol. Powers, page 7.

In the case of Berthoff v. O'Rielly, 74 N. Y., which the learned trial judge cited for his definition of liberty, the proposition here contended for by appellant is most ably maintained. That court said:

"The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." .74 New York, 514.

Again: "Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution." 74 N. Y., 516.

A very able opinion to the same effect may be found in the case of Sharpless v. Mayor, 21 Pa. St., 147, delivered by that great jurist, Chief Justice Jeremiah S. Black. Indeed, it seems to be the settled law of the land. The following authorities illustrate and support the general proposition:

Stone v. Miss., 101 U. S., 814.

Beer Co. v. King, 97, U. S., 25.

Thorpe v. Rutland, 27 Vt., 149.
State v. Wheeler, 25 Conn., 390.
Mayor v. Miln, 11 Peters (U. S.), 139.
Cochran v. Van Serley, 20 Wend., 380.
Donnan v. State, 34 Ala., 232.
Boston v. Cummings, 16 Ga., 112.
Hamilton v. St. Louis Co., 15 Mo., 23.
Wynehamer v. People, 13 N. Y., 390.
Town of Gilfors v. Supervisors, 13 N. Y., 143.
Dibbrell v. Morris Heirs, 15 Southwestern, 87, 90.
United States v. Freight Association, 166 U. S., 290.

The liberty to contract is limited to lawful subjects. The State has a right to make any contract which the legislature deems to be contrary to sound public policy, unlawful. Lotteries have been prohibited for that reason. Dealing in futures is likewise prohibited. Gambling contracts of all kinds are held void because prohibited by law. For the same reason contracts in restraint of trade, the tendency of which is to destroy competition, Texas sought to prohibit. In the language of Mr. Justice Peckham, speaking for this court, its purpose was to prevent the "driving out of business of smaller dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings." The reason for such legislation is forcibly put later on by the same learned justice. His language will bear repetition here. He said:

"Mere reduction in the price of the commodity dealt in might be early paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great or extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods. * * * * * * * when such changes are effected by combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity, and render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result

in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent for a corporation for selling the commodities which he once manufactured or dealt in; having no voice in shaping the business policy of the company, and bound to obey orders issued by others. Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce."

The language of the Supreme Court above cited ought to be a sufficient answer to the suggestion that the legislature of Texas has not the right to prevent contracts in restraint of trade, whose tendency is so injurious to society, even though to a limited extent, the liberty of the citizen may be thereby abridged.

The decision of the lower court was evidently based upon a misconception of the terms of the law. This is plainly shown by the following quotation from the opinion contained in the record:

"It (meaning the law) makes unlawful the making or carrying out of any contract, obligation or agreement by which two or more persons, firms or corporations combine themselves not to sell any article below a standard or common figure. * * * * To pool, combine or unite any interest they may have in connection with the sale and transportation of any article when its price might in any manner be affected. * * *

"An agreement between two or more persons forms a combination between them. An agreement between two or more persons is made as criminal as an agreement between 100. No attempt is made to condemn only acts which are oppressive by reason of their magnitude; it is evident that it is made criminal for two persons to combine as partners, corporators or otherwise in the ordinary business of life, to increase or reduce the price of commodities or fix the standard thereof." (Record, pp. 91-92.)

The construction of the lower court was to the effect that it prevented the formation of partnerships or of corporations.

The act was passed in 1889. The laws of Texas at that date permitted corporations and partnerships to be formed. At the same session of the legislature at which the act was passed, foreign corporations for life insurance were authorized to be admitted in the State for the purpose of doing business. Section 1 of that act reads as follows:

"That companies or associations organized under the laws of any other State of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this State regulating other insurance companies, shall be licensed * * * * to do business in this States," etc.

This act was approved April 3, 1889. See acts of 1889 of the Texas Legislature, p. 98.

On the 19th day of March, 1889, an act was passed authorizing corporations and partnerships to be formed for irrigation. Section 9 of that act reads as follows:

"When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation, or association of persons, except for domestic use by anyone entitled thereto, to so divert the flow of water in said river or stream in such manner and to the extent of depriving said person, corporation, or association of persons in priority the use of the water to which they may be so entitled."

Section 10 reads as follows: "Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the State of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs, and wells, and of conducting, transferring, and furnishing water to all persons entitled to the same, for irrigation and domestic uses, and for the purpose of building storage reservoirs for the collection and storage of water for the uses before mentioned, and for mining, milling, and stock-raising," etc. Session Acts of 1889, Texas Legislature, p. 101.

On March 29th, 1889, an act authorizing railway corporations to be formed was approved, so as to authorize the purchasers of railroad property under foreclosure sale to form corporations on more favorable terms and conditions than would be allowed to those who undertook to construct a railroad from the beginning.

This much has been said for the purpose of showing that it would hardly be probable that the Texas Legislature would on various dates prior to March 21st, 1889, authorize the creation of partnerships and corporations for various purposes, and then on the 21st day of March, 1889, at the same session, pass an act intended to prevent the formation of partnerships and corporations; and then eight days later pass another act which recognized the validity of existing corporations, and attempt to maintain them. That construction leads to such a great absurdity that it ought not be obtain. Surely the Legislature of Texas, or of any other State, would not by implication or construction be held to reverse its intention so many different times during the same session, unless the language of its several acts was susceptible of no other reasonable construction. The several acts passed at the same session disprove the contention of the trial court.

The language of the act itself, considered alone, does not justify the decision of the lower court.

The language upon which the trial court based this singular conclusion reads as follows:

"That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: (1) To create or carry out restrictions in trade. (2) To limit or reduce the production, or increase or reduce the price of merchandise or commodities. (3) To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce or commodities. (4) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this State. (5) To make or enter into, or execute, or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall

agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

It is plain from the paragraph above quoted that the learned trial judge erred in his construction. That the legislature did not thereby intend to prevent the creation of corporations or firms or partnerships, is manifest. It recognized the existence of partnerships and of corporations as separate entities, but sought to prevent other combinations so as to destroy competition and agreements in restraint of trade. Our Supreme Court, speaking through Associate Justice Denman, practically so held in a recent case. It said:

"In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. * * * If we consider the purpose for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced, is where the partses in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." (Meaning the purposes mentioned in the statute.) Gates v. Hooper, 39 S. W. Rep., 186.

That ought to be conclusive of the question under the well settled rule that the construction placed upon a State statute by its Supreme Court will be conclusive as to the legislative intent. If the contention of the trial judge be correct, the statute should not have stated that persons, corporations and associations of persons should not combine, but it should have stated that no corporation, partnership or association of persons should be permitted to exist for the purpose of carrying on trade for the reason stated, that their contracts would operate in restraint of trade.

The definition of partnership is so essentially different from a trust that it is singular how the trial court fell into such an error. Mr. Bates defines a partnership as "a contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business, as principals, for the purpose of joint profit." (Bates' Law of Partnership, Sec. 1.)

Again, "A partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some, or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." (3 Kent's Comm., 23.)

Or, as Mr. Stroud expresses it—"A partnership is an agreement that something shall be attempted with a view to gain, and that the gain shall be divided between them."

Mr. Bouvier defines a partnership as "an agreement between two or more persons for joining together their money, goods, labor and skill, or either or all of them, for the purpose of advancing fair trade, and of dividing the profits and losses arising from it, proportionally or otherwise, between them." (Bouv. Law Dict., title, Partnership.)

From the above definitions it seems plain that a partnership means at least that each member of the "combination" must share in the losses and profits, proportionately or otherwise. The same may be said of corporations. The members of a corporation must also share the profits and losses of the enterprise, but they are to constitute separate entities, and are to be dealt with as such. The construction of the court below was a strained one, because combinations in restraint of trade have been for centuries recognized by the common law. As an elementary writer puts it: "The rule that contracts that are in restraint of trade shall be void as against public policy is among our most ancient common law inheritances; as early as the second year of Henry V., A. D. 1415, we find by the Year Book that this was considered to be an old and settled law." (Spelling on Trusts and Monopolies, Sec. 4.) Yet during all this period partnerships were legal.

When the legislature declared against combinations and conspiracies in restraint of trade, it must have used the terms in the sense in which they have been understood for so many centuries. The error of the court in holding otherwise is palpable.

The criticism of the Texas statute made by the learned trial court is equally applicable to the Federal statute on the same subject. The Act of Congress passed January 2nd, 1890, says that "every contract, combination in the form of a trust or *otherwise*, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is hereby declared to be illegal."

The Federal statute above noted in the recent case of the United States v. Trans-Missouri Freight Association, was held to apply to all contracts of whatsoever character, that were in restraint of trade, but yet the statute was held valid.

NINTH ASSIGNMENT OF ERROR.

The court erred in holding in effect that the passage of this law did not involve the exercise of a police power of the State, when undertaking to prohibit contracts in restraint of trade, which the experience of generations has proven to be hurtful to the community.

TENTH ASSIGNMENT OF ERROR.

The court erred in holding that the exemption of agricultural products while in the hands of the person producing them, and the exemption of live stock while in the hands of those who raise them, invalidate the statute, because said exemption is such an one as properly addresses itself to the legislative discretion, and was not an arbitrary discrimination in favor of or against any class.

These two assignments of error are so nearly alike that they will be treated together.

Is not the act in question a police regulation?

That it is seems to be too clear for argument. It is difficult to get an accurate definition of the police power of a State. (Stone v. Mississippi, 101 U. S., 814.) No two authors use the same language, or, indeed, give substantially the same definition. Mr. Cooley says:

"The term has been defined as the general power of the government to preserve and promote the public welfare, even at the expense of private rights."

Cooley's Constitutional Limitations, 6 Ed., 624.

Tiedeman's Limitation of Police Power, Sec. 1.

If the public welfare can be best promoted by preventing the character of contracts which this statute seeks to prohibit, certainly it should be classed as a police regulation.

In New Orleans Gas Lighting Co. v. Hart, 40 La. Ann., 474, the term has been defined as follows:

"Police power is the right of State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution."

The following cases also give definitions applicable to the term under review:

Mayor of New York v. Miln, 11 Pet., 139.

Stone v. Mississippi, 101 U. S., 814.

Boston Beer Co. v. Massachusetts, 97 U. S., 25.

Commonwealth v. Alger, 7 Cush, (Mass.,) 84.

Thorpe v. Rutland R. R. Co., 27 Vt., 149.

In defining the term this court has said:

"Every law comes within this description (of police regulations) which concerns the welfare of the whole people of the State, or any individual within it; whether it relates to their rights or their duties; whether it respects them as men or citizens of the State; whether in their public or private relations; whether it relates to the rights of persons or property, of the whole people of a State, or of any individual within it; and whose operation is within the territorial limits of the State, and upon persons and things within its jurisdiction." (Mayor of New York v. Miln, 11 Pet., 139.)

The Supreme court of Maine, has said:

"With the legislature, the maxim of law—*salus populi suprama lex*, should not be disregarded. . . . How far the provisions of a legislative act extend is always submitted to its discretion; provided these acts do not go beyond the great principle of securing the public safety." (State v. Noyes, 47 Me., 211.)

Or, as said by the Supreme court of Illinois:

"The police power of a State is co-extensive with self-protection, and is not inapplicably termed the "law of overruling necessity." It is the inherent and plenary power of the State which enables it to prohibit all things hurtful to the comfort and welfare of society." Lake View v. Rose Hill Cemetery Co., 70 Ill., 192.

The broad scope of the term police power can be as well understood from its illustrations as from definitions. For instance, the public health can be preserved by police regulations in the form of quarantine laws; and in the regulation of the slaughtering of animals.

Slaughter House Cases, 16 Wall., 36.

Butcher's Union etc. Co. v. Cresson City etc. Co. 111 U. S., 146.

New Orleans v. Stafford, 27 La. Ann., 417.
Cooley's Constitutional Limitations, 4 Ed., 506.
State v. Natal, 39 La. Ann., 439.

Such is the right to forbid the adulteration of food products.
State v. Campbell. 64 N. H., 492.
People v. West, 44 Hun., 162.
People v. Aaronsburg, 155 N. Y., 123.
Waterbury v. Newton, 50 N. J. L., 534.

Such is the right to prevent the pollution of water sources.
State v. Wheeler, 44 N. J. L., 88.

It is by the exercise of this power that burial grounds are located and drainage systems inaugurated.
Commonwealth v. Wait, 11 Allen (Mass.), 264.
State v. Campbell, 64 N. H.

It is by the exercise of police power that all acts injurious to public morals are prohibited, such as the sale of injurious drugs, or intoxicating liquors; the sale of obscene books and pictures.
Thompson v. State, 17 Texas Appeal, 253.
Cooley's Constitutional Limitations, 4 Ed., 596.

But it must not be supposed for a moment that the police power of State is exhausted when all matters pertaining to health and morals are properly adjusted. By the exercise of this power all business enterprises may be regulated, so as to best secure the general welfare of the people. Thus all charges made by ferrymen, common carriers, hackmen, bakers, wharfingers, hotels, etc., may be regulated by law under a proper exercise of the police power of the State.
Munn v. Illinois, 94 U. S. 113.
Chicago R. R. Co. v. Iowa, 94 U. S., 155;
Stone v. Wisconsin, 94 U. S., 181.
People v. Budd, 117 N. Y., 1.

It is by this power that the State was permitted to regulate the hours that women and children might labor in manufacturing establishments, and also to provide for the manner in which they should be paid.
Commonwealth v. Hamilton Mfg. Co., 120 Mass., 383.
Shaffer v. Union Mining Co., 55 Md., 74.

Under the exercise of police power, States may regulate the amount of interest that may be charged for the loan of money.

Cooley's Principles of Constitutional Law, 235.

All laws prohibiting the erection of wooden buildings within certain limits in cities, and the regulation of the various kinds of business are police regulations. Indeed, the right to prohibit or license a given calling is recognized as one of the inherent police powers of a State.

Whether the statute in question be tested by definitions or illustrations, it should be conceded to be a police regulation; and if constitutional must be held valid, whether deemed by this court to be wise or unwise. Because a police power can be exercised only by legislative enactment, and it lies solely within the legislative discretion to determine when the public welfare or safety requires its exercise.

Munn v. Illinois, 94 U. S., 113.

Courts are authorized to interfere with the exercise of this police power only when the act in question conflicts with either the State or Federal constitutions.

Munn. v. People, 69 Ill., 93.

Lake View v. Rose Hill Cemetery Co., 70 Ill., 192.

Godard v. Jacksonville, 15 Ill., 588.

Soon Hing v. Crowley, 113 U. S., 703–10.

So long as the legislature does not pass its limit fixed by the constitutions, the courts have no authority to interfere simply because the legislative acts in question are supposed to violate some principle of justice and right.

Tiedeman's Limitations of Police Power, Sec. 24.

Cooley's Constitutional Limitations, 4 Ed., 168.

People v. Toynbee, 2 Park (N. Y.), 329.

Berthoff v. O'Reilly, 74 N. Y., 509.

Albrich v. State, 8 Texas Appeals, 229.

It should also be remembered that the police power of a State may be exercised by an entire or partial prohibition of a particular business regarded as injurious.

Stone v. Mississippi, 101 U. S., 814.

Ex Parte Andrews, 18 Cal., 685.

This leads us to a discussion of the tenth assignment of error.

Is the act in question void because it in express terms exempts from its operation agricultural products while in the hands of the producer, and live stock while in the hands of the raiser?

Remembering the doctrine laid down above, that the legislature in the exercise of a police power may either *partially* or *wholly* prevent the acts which are deemed injurious to the public, it should be held that the exemption in question does not render the statute void. The trial judge fell into an error in the opinion contained in this record by not keeping in mind at all times that the legislature was exercising a police power when it passed this act; and that in the exercise of a police power, it was limited, so far as this court was concerned, only by the fourteenth amendment to the Federal Constitution. That same amendment operated as a limitation on all other powers exercised by the State, as well as the police power. For example, no tax law can be held valid if it conflicts with that amendment. No police regulation can be enforced which fails to conform thereto. The contention that I desire to make clear is that the taxing power of the government, and the police power of the government, are hedged in by the same limitations. The States are not exempt from the operation of the fourteenth amendment in the passage of revenue measures or tax laws; the limitation which permits different rules of taxation for different kinds of property, permits different police regulations for different classes of property, and different kinds of persons. In either case seeming discriminations must be based upon some reason. They must not be arbitrary. That is all that the Federal Constitution requires. That is all that the State Constitution demands when it says that all laws must be equal and uniform. If the reason exists, then this court stops all further inquiry. It has no power to interfere with the legislative discretion although unwisely exercised. Within the limitations of the Constitution the legislature is supreme.

The court below by losing sight of this proposition fell into error. It quoted authorities to support the conclusion reached which had no application to the question in hand.

The statutes which have been held to be invalid as shown by

the decisions relied upon by the court below and appellee may be classified as follows:

1. Those which prescribe rules for the collection of debts for one class of persons different from those applying to all other classes, and which rules are in no sense police regulations.

Frorer v. People, 141 Ill., 171.
Braceville Coal Co. v. People, 147 Ill., 66.
State v. Goodwell, 33 West Va., 179.
State v. Coal and Coke Co., 33 West Va., 188.
Weilder v. Railway Co., 70 Mich.
Railway Co. v. Williams, 49 Ark., 492.
Joliffee v. Brown, 14 Wash. St., 155.
Chair Co. v. Reynolds, 77 Mich. 104.
Railway Co. v. Beatty, 6 Neb., 37.

2. Those which undertake to prescribe regulations amounting to a partial prohibition of some one particular business not in itself contrary to public policy and not injurious to society in any sense, but on the contrary well nigh indispensable.

This class of statutes is illustrated by the one prohibiting bakers, but no others, from baking bread on Sunday, as well as the one prohibiting barbers, but no others, from keeping their places of business open on Sunday.

Raigo v. State, 6 S. W. Rep., 401.
55 Cal., 550.
Edan v. People, 61 Ill., 296.

3. Those which seek to exempt certain individuals or corporations, naming them, from the operation of the ordinary rules of court procedure, or fixing a different rate of interest which they may charge or receive.

Gordon v. Building Assn, 12 Bush., 410.
R. R. Co. v. Moss, 60 Miss., 64.

4. Those which are held void because violative of some limitation imposed by the State Constitution.

State v. Ragio, 6 S. W. Rep., 401.

5. Those which seek to regulate the methods of conducting some kinds of business, which regulations subserve no public good, and for which no good reason can be given. Such as

State v. Coal and Coke Co., 33 West Va., 188.

6. Under the same class to which the above subdivisions belong may be put the case of Pierson v. City of Portland, 69 Maine. 278. To this may be added the case of G. C. & S. F. Railway Co. v. Ellis, 166 U. S. The court there was construing a statute which regulated the method of collecting debts from railroad companies and none others. This court held in that case that the statute was not a police regulation, in that it was not made to appear to this court that there was any law in Texas requiring railroads to be fenced. But in any event, that was immaterial, because the attorneys' fees there authorized to be collected were not limited to damage cases growing out of the failure of the railroad company to observe any police regulation, but applied to all damage cases as well as other indebtedness, hence it could be classed under these cases heretofore mentioned as not applicable to this case, in that no police regulations were involved.

The case of Dibbrell v. Morris Heirs, 15 S. W. Rep., 87-95, cited in Railway Company v. Ellis, does not militate against the position of appellant in this case. It simply announced the doctrine that when a class is exempted from the operation of law, the exemption must be based upon some *reason*, and not be a mere *arbitrary classification*. The language of the distinguished judge delivering the opinion supports the position of the appellant in this case. He said:

"It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this court were arbitrary in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz: *First*, for the purpose of taxation: *second*, for police purposes; *third*, for the necessary protection of the particular class; *fourth*, for the release of a class from some particular obligation or liability."

He then proceeded to give examples under each of the classes named, in which legislation in favor of or against a particular class had been recognized as valid, and not only as valid but absolutely necessary. 15 S. W. Rep., 93. That case supports the contention of appellant in this case.

In this connection, it might be well to advert to the case of Ragio v. State, 6 S. W. Rep., another Tennessee case relied on

by appellee in the court below. In that case the Supreme Court of Tennessee held a statute void because in conflict with the State Constitution, in that it embraced more than one subject, and also because it prohibited no one but barbers from keeping their bath rooms open on Sunday. The article of the State Constitution in reference to the exemption reads as follows:

"The legislature shall have no power to pass any law for the benefit of individuals, inconsistent with the *general law of the land.* Nor to pass any law granting to an individual, or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to *any member of the community* who may be able to bring himself within the provisions of such law." Ragio v. State, 6 S. W. Rep., 401-2.

Similar cases can be easily found, where State statutes have been held void because in conflict with the State Constitution. For instance, it was held in Begg's case, 43 Pa. St., ——, that an act of the legislature permitting a new trial in a single case therein named was void, first, because it was an invasion of the province of the judiciary; second, because it established a different rule for the litigants of that particular case than would be applicable to the litigants of a similar character throughout the State.

So, in the 24th Michigan, an act of the legislature of that State was declared to be void because violative of the State Constitution. The Constitution provided that officers of the State should be elected at *such times* and in such *manner* as the Legislature might direct. That body did not content itself with fixing the time and directing the method in which the officers should be elected, but by an act of its own proceeded to name and elect the officers. 24 Mich., 40.

The Legislature of Wisconsin prescribed that no costs should be recovered against the city of Janesville in any action where the same is commenced to set aside any tax assessment or tax debt, or to prevent the collection of taxes or assessments in said State. The Supreme Court of Wisconsin held that this provision in the charter—the enactment of a special provision dispensing with the general law in *a particular case*, granting to *one* man or corporation, by way of exemption from the operation and effect of a general law, a privilege or indulgence which

no other person or corporation has, is unjust and void. Durkee v. City of Janesville, 28 Wis., 464-5.

It will be noted that in that case the act under review was one regulating the method of assessment of cost in litigated cases, and an exception to the general rule was sought to be made by statute in favor of one particular litigant.

It was akin to the decision in a Tennessee case which construed an act of the Tennessee Legislature. The legislature had provided that the officers, agents or servants of a particular banking corporation should be guilty of crime if they embezzle or appropriate, without authority, funds of the corporation. It was held void because it did not embrace all persons in like state, and surrounded *by like circumstances.* Budd v. State, 3 Humph., 483.

An act was passed by the Wisconsin Legislature preventing the erection of certain improvements at a certain point, naming it. It was held void because it deprived the riparian owners of their rights to use their property, without due process of law, and because it was an assumption of judicial power on the part of the legislature of the State. It was therefore violative of the State Constitution as well as the Federal. City of Janesville v. Carpenter, 77 Wis., 284.

It was held in Michigan that a newspaper had no more right to circulate libelous matter than private individuals. That position seems to be sound. Park v. Free Press, 72 Mich., 360.

An act imposing liability on railroad companies for damages done without giving them the right of judicial ascertainment, was held void by the Supreme Court of Alabama. R. R. Co. v. Morris, 65 Ala., 194. That is not applicable to this case.

On the other hand, however, an act making a different statute of limitations for railroad companies than is applicable for other parties, has been held valid, and in the same case. 65 Ala., 194.

In California, a Sunday law which forbid bakers to bake bread on Sunday, while permitting all other persons so to do, was held void, because applied to bakers only. The Supreme Court of California could find no good reason why a baker should not cook his breakfast on Sunday as well as any other person. He was compelled to eat on that day the same as other

people. That act seemed, therefore, to overstep the boundaries of police regulations. That case is easily distinguishable from this. 55 Cal., 550.

On the other hand, an ordinance exempting drug stores and livery stables from the operation of the Sunday law was said to be valid. But one exempting Jews therefrom was held void, because no race or religion is recognized in law, while the existence of the different occupations would be readily recognized. Shrevesport v. Levy, 26 La. Ann., 671.

An Illinois statute which forbid barbers, and barbers only, to keep open their shops or work at their trade on Sunday, for a similar reason, was held to be void. Eden v. People, 61 Ill., 296.

A special act of the Kentucky legislature, allowing a building and loan association to charge a greater rate of interest than was allowed any other citizen of Kentucky, was held void. Gordon v. Blg. Assn., 12 Bush., 410. That was not a police regulation, but was a special privilege arbitrarily granted to one association only.

An act of the Mississippi Legislature, which made the terms upon which corporations might appeal from decisions in favor of the citizens of Mississippi more onerous than those applicable to citizens of other States, was held void. How it could have been otherwise is difficult to understand. R. R. Co. v. Moss, 60 Miss., 64.

Counsel for appellee, in their brief, which they have injected into the record, and thereby compelled the appellant to print, rely upon the case of James v. Reynolds, 2 Texas, 252, to show that this statute was void. In that a very different principle applied. It was there held that a statute authorizing a summary judgment against obligors on a bond must be strictly complied with before such a judgment could be entered. In other words, the bond should not be more onerous than the statute provided. But it was also held that if the bond conformed to the statute it would be valid, and that a summary judgment might be entered.

The same doctrine was announced in Hanks v. Horton, 5 Texas, 103; Harris v. Shackleford, 6 Texas, 133. Indeed that is the settled law of Texas. But that question is not involved in this case.

In Michigan another statute was passed authorizing the taxing of an attorney's fee of $25 in actions against railway companies for damages for cattle killed, but the Supreme Court of that State held the statute unconstitutional, because applicable to railway companies only. It will be noted that that was not an act of police regulation, but it was an effort to apply a different doctrine to a railroad company in respect to the payment of their debts than was applicable to other persons, utterly dissimilar to this case. Weilder v. Ry. Co., 70 Mich. That was like the Ellis case.

In Arkansas a similar statute was held invalid, Ry. Co. v. Williams, 49 Ark., 492.

But in Dowe v. Beidleman, 49 Ark., 455, another statute of that State, allowing attorney's fees in actions for the recovery of overcharges against railways, was held valid. The reason of that was that that was a penalty for the violation of a necessary police regulation of the State, the fixing of maximum freight and passenger rates.

The case of Joliffee v. Brown, decided by the Supreme Court of Washington, (14 Wash. St. 155) as well as in Chair Company v. Runnels, (77 Mich., 104,) is in accord with the case of Railway v. Williams, and the Michigan cases above cited. In each of these cases the statutes were held void for the same reason—that they simply regulated the collection of debts—and were not police regulations.

For a like reason a statute which arbitrarily provided that the owner of live stock accidentally killed or destroyed on a railway track might recover double its value, was held to be invalid. Ry. Co. v. Baty, 6 Neb., 37.

An act of the Illinois Legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner was held to be arbitrary, because no reason for the existence of that law could be found, particularly as it was applicable to none others than the owners and operators of coal mines. Millett v. People, 117 Ill., 294.

Another Illinois statute which prohibited people in the mining or manufacturing business from keeping stores to furnish supplies to their employees was held invalid as an unnecessary

and arbitrary restriction against people engaged in that business. Frorer v. People, 141 Ill., 171.

Another statute requiring certain corporations to pay their employees weekly was held to be void, because no reason could be given for making the discrimination or distinction. Braceville Coal Co. v. People, 147 Ill., 66.

In West Virginia, a statute preventing miners and manufacturers from issuing any paper except such as was specified in the act, to their laborers in payment of what was due them, was held to be void. State v. Goodwell, 33 West Va.. 179.

In the case of the State v. Coal and Coke Co., 33 W. Va., 188, the court held that a statute which prevented an employer from selling to his employes at a greater per cent. of profit than he sells to others not employed by him, was unconstitutional and void. The reasons given in that case were that it was too restrictive, and made no exceptions in cases of charity or kindred. It was believed to be an unnecessary discrimination against those who happened to be engaged in mining and manufacturing, while it applied to no other persons. But the Supreme court of Maryland holds such statutes valid. Shoffi v. Mining Co., 55 Md., 74.

In Maine a statute was passed providing that persons injured by defective sidewalks or highways could not recover of the city or town responsible for the injury unless he could show that at the time the damage was done, that in the country in which he resided damages could be recovered under similar circumstances. That was plainly in conflict with the fourteenth amendment, because it made the individual's rights under the statute depend on the particular local law of the country in which he happened to reside. Pearson v. City of Portland, 69 Me., 278.

Cases from other states have been cited by the appellse, but they, together with those herein reviewed, are based upon statutes easily distinguished from the one under consideration.

Plainly all of the statutes reviewed in the authorities above mentioned are utterly dissimilar to the one which the court is asked in this case to construe. All of the cases cited cannot be entirely reconciled,—and I do not approve all that they decide; nor do I believe all of them are sound, but none of them pro-

perly interpreted militiate against appellant's contention in this case.

In addition to the cases above noted, several decisions of this court have been cited in support of the proposition that the statute in question is void. The case of Yick Wo v. Hopkins, 118 U. S., 956, is relied on by counsel for appellee. The ordinance in that case was held to be void because it conferred upon the municipal authorities arbitrary power at their own will, and without reference to legal discretion, to refuse consent as to persons or places, without regard to the competency of the person applying, or the territory or places selected, for the carrying on of the business of public laundries. This holding was justified on another ground—that the municipal authorities whose duties it was to administer the ordinance, applied it so as to make unjust and arbitrary discriminations against the Chinese. That case, of course, has no application to this. It was objectionable for two reasons: 1. It permitted arbitrary discriminations to be made against persons and places. 2. As executed it made a race discrimination against the Chinese.

Other cases have been cited to this court where state statutes which arbitrarily exclude colored men from a jury have been held to be void. They are not in point.

As before stated I do not mean to indorse all of the decisions upon which counsel for the appellee rely. But my contention is that they are inapplicable here because the statute now under consideration falls within none of the classes which these cases discuss and determine.

1. It does not prescribe any rules for the collection of debts.

2. It does not undertake to prescribe regulations amounting to a prohibition of some one particular kind of business which does not injuriously affect society.

3. It seeks to prescribe no different legal remedy for one class of citizens than that open to other classes similarly situated.

4. It does not violate the Constitution of the State.

5. It gives no race any advantage over any other race.

6. It is not an unreasonable discrimination against any one class or business, as will be hereafter shown.

It is submitted, therefore, that the decisions relied upon by appellee have no application to this case.

This leads us to a consideration of other cases which support the contention of appellant here made, and the reasons upon which these cases are based. In this connection it should be remembered that there is nothing in the proposition made by the court below that the statute in question does not apply to but a small percentage of the population of the people of Texas. That it applies to only certain classes, and that there are certain classes of people to whom it does not apply is immaterial. A large part of the legislation of the entire country is "class" legislation; that is to say, it is limited to some particular class of citizens or subjects. But it is not for that reason invalid. The question as to the number of people, or the amount of property to which a law applies has nothing to do with its validity. The court will not inquire what proportion of the people will be affected by the law. It will ascertain whether there was reason for the discrimination made, but beyond this it will not go. This court has wisely said:

"The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory in which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. Hays v. Missouri, 120 U. S., 111-2.

The following cases support and illustrate the proposition there made.

City Railway Tax case, 92 U. S., 912.
Kentucky Tax case, 115 U. S., 578.
Pacific Express Co. v. Seibert, 142 U. S., 339.
Natal v. Louisiana, 139 U. S., 621.
Crowley v. Christensen, 137 U. S., 87.
Kidd v. Pierson, 128 U. S., 1.
C. B. & Q. Ry. v. Iowa, 94 U. S., 155.
Mugge v. Kansas, 123 U. S., 623.
Minn. Ry. Co. v. Beckwith, 129 U. S., 26.
Home Insurance Co. v. N. Y., 134 U. S., 594.
Giozza v. Tiernan, 148 U. S., 662.

Railway Co. v. Macay, 127 U. S., 205.
In re Kemler, 136 U. S., 436.
Railway Co. v. Humes, 115 U. S., 512.
Barbior v. Connollee, 113 U. S., 27.
Soon Hing v. Crowley; 113 U. S., 708–9.
R. R. Co. v. Gibbs, 142 U. S., 386.

The same rule has been recognized by the Supreme Courts of the various States of the American Union. Southerland on Stat. Cons., Secs. 125–6–7, and authorities there cited.

This rule is recognized in that line of authorities which held that any State in the American Union might prevent foreign corporations from establishing offices within its limits until the taxes required by its laws to be paid have been collected.

Pemb. Mfg. Co. v. Penn., 125 U. S., 183.
Paine v. Va., 8 Wall., 168.
Bank v. Earle, 13 Pet., 519.
La. Ins. Co. v. French, 8 How., 404.
D. v. Chicago, 10 Wall., 410.
St. Clair v. Cox, 106 U. S., 350.
Ph. F. Assn. v. N. Y., 119 U. S., 110–20.
Missouri v. Lewis, 101 U. S., 22–30.
Hays v. Mo., 120 U. S., 68.

Statutes regulating liquor dealer's licenses, although applied to a very small percentage of the population of each State, have been held valid.

Giozza v. Tiernan. 148 U. S., 662.
Crowley v. Christensen, 137 U. S., 87.
Kidd v. Pierson, 128 U. S., 1.
Mugg v. Kansas, 123 U. S., 623.

A New York statute requiring electric railways to file maps of their proposed route with a board of commissioners, and to pay the expenses of the board in the examination of the road and maps, was held valid. It was declared to be a necessary exercise of police power, although it applied to no other class of railroads, and but a small percentage of the people in that great metropolis.

New York v. Squire, 145 U. S., 175.

A South Carolina statute requiring railroads of the State to pay the salaries and expenses of the State Railway Commission was held valid by this court, as a necessary police regulation. Yet that statute was limited in its application to railroad property. No other class of property except railroads was compelled to bear that burden.

Railway Co. v. Gibbs, 142 U. S., 386.

Laws making the rule for the assessment of taxes on railroad property different from other property have been upheld by this court.

City Ry. Tax case, 97 U. S., 576.

Ky. Tax cases, 115 U. S., 321–37.

In the case last cited, the court said:

"The whole matter is left to the discretion of the legislative power (meaning the matter of taxation) and there is nothing to forbid the classification of property for the purpose of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same kinds and methods to be applied impartially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. *The different nature and uses of their property justify the discrimination in this respect* which the discretion of the legislature has seen fit to impose. (Italics mine.) 115 U. S., 337.

This doctrine is also illustrated in the following cases:

Bells Gap Ry. Co. v. Pa., 124 U. S., 232-7.

Home Ins. Co. v. New York, 134 U. S., 594-607.

Pacific Express Co. v. Seibert, 142 U. S., 339-51.

The cases above cited show the operation of the fourteenth amendment on the States in the exercise of their taxing power. Many other cases might be cited to the same effect, but these will suffice. They make plain the fact that this court has never held that the fourteenth amendment prevented the States from discriminating in their tax laws against certain classes. It is understood and clearly understood that there are abundant reasons why some classes of property should be taxed by different rules from other classes. The only proposition which this court has maintained in that connection is that there must be some *reason*

for the classification of property and for the application of different rules to different classes. In other words, the legislatures may not *arbitrarily* discriminate against any class. But if the reasons for the discrimination exists the inquiry ends. A large measure of discretion is vested in the legislatures. Courts must recognize that few human laws are exactly just, and that in these different classifications of property absolute justice and equality is unattainable. To approximate justice is all that should be expected the most exacting.

The same rule has been announced by this court in reference to police regulations. Police regulations have been upheld that have applied to but one kind of property. For instance, as above shown, this court has frequently upheld statutes regulating the liquor traffic. In Giozza v. Tiernan, above cited, a Texas statute imposing a very much higher license on a liquor dealer than on any other class of merchants was held to be valid. Literally is discriminated against liquor merchants. A larger tax was necessary for the privilege of selling whiskey than for the privilege of selling the same value of dry goods. But this court held that there was sufficient reason for the discrimination. The statute was therefore held valid.

It was also held by this court that a State statute compelling railway corporations to pay double the amount of the value of stock killed by its cars or engines on an unfenced railroad, where the statute required it to be fenced, was valid.

Missouri Pacific Ry. Co. v. Humes, 115 U. S., 512.

But that statute did not make the owner of unfenced lands responsible for double the value of stock killed thereon. The statute was upheld because of the difference in the circumstances surrounding the owner of the unfenced lands, and the owner of the railroad.

The same doctrine is announced in Minn. Ry. Co. v. Beckwith, 120 U. S., 26, and in Ry. Co. v. Macay; 127 U. S., 205.

The State courts are in accord with that view of the question.

Welsh v. R. R. Co., 53 Iowa, 632-4.

Bennett v. Ry. Co., 61 Iowa, 355-66.

Dowe v. Beidelman, 49 Ark., 492.

The case of the Railway Co. v. Ellis, heretofore alluded to, does not conflict with the cases above cited. That case, as be-

fore shown, was based upon a statute which was not a police regulation at all, nor was it made to enforce a police regulation. Whereas, in the case last above cited, the statute therein construed was made to enforce a police regulation, and was hence valid.

A similar statute discriminating against certain classes of business was upheld by this court in the laundry cases.

Barbior v. Connollee, 113 U. S., 27.

Soon Hing v. Crowley, 113 U. S., 709.

Why? Because there were reasons why these regulations should be enforced against laundries, yet the regulations were unnecessary for any other kind of business.

The Supreme court of New Hampshire in the case of the State v. Marshall, 64 N. H., 549, recognized this distinction.

The Supreme court of Maryland has upheld a statute requiring all oleomargarine sold to be stamped as such, yet no such requirement was made as to other commodities.

Pierce v. State, 63 Md., 532.

A statute prohibiting the manufacture and sale of oleomargarine, or the manufacture of the same with the intent to sell, was held valid; and the fact that oleomargarine when pure may be wholesome was immaterial.

Powell v. Commonwealth, 114 Pa. St., 265.

127 U. S., 679.

In Massachusetts and New Hampshire the sale of watered milk has been forbidden by statute, and the statute upheld, though the water was pure.

Commonwealth v. Waite, 11 Allen, 264.

State v. Campbell, 64 N. H.. 402.

Laws requiring separate coaches for white and colored passengers have been upheld.

R. R. Co. v. State, 66 Miss., 662.

133 U. S., 587.

Laws requiring separate schools for white and colored children have been upheld.

Leehew v. Brummel, 15 S. W. Rep., 765.

People v. Gallagher, 93 N. Y., 438.

Dawson v. Lee, 83 Ky., 49.

Roberts v. Boston, 5 Cushing, 198.

A statute prohibiting the sale or transportation of cotton by night within certain counties has been held valid.

Mangin v. State, 76 Ala.

Davis v. State, 68 Ala.

The above citations of authority have been made for the purpose of illustrating the application of the rules herein contended for, viz.: That the fourteenth amendment to the Federal Constitution requires the same uniformity in tax laws that it does in police regulations. It should also be remembered that the taxing power and the power to regulate are frequently one and the same. The police regulations and the power to tax are more nearly allied than any other two powers of government. It depends altogether on what is the purpose of an occupation tax as to whether it is regarded as a revenue measure or a police regulation.

Cooley on Taxation, 1st Ed., Chapter 19, pp. 396 and 397.

Bearing in mind this similarity, it will not then be difficult to understand that the Legislature of Texas, in passing the anti-trust law with the exemption, which rendered it inapplicable to agricultural products in the hands of the man who produced them, or live stock in the hands of those who raised them, made no new departure from the fixed policy of the State. The court below intimated in the opinion, which is brought up in the record, that the Texas Legislature was actuated by some sinister purpose, some desire to pander to the agricultural classes in the exemption under consideration. The fact that he was a non-resident of the State and unacquainted with Texas is doubtless his excuse for falling into this error. Texas came into the Union in 1845 with a Constitution of her own making, which was acceptable to the American Congress in every essential particular. That contained an exemption. Section 27, article 7, reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession: provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical." (Sayles' Texas Statutes, Vol. 4, p. 211.)

It will be noted that in this case uniformity of taxation was demanded, just as the fourteenth amendment demands, that "no law shall be passed by any State which will deny to any person within its jurisdiction the equal protection of the laws." The legislative discretion, however, to exempt certain classes of property from taxation was recognized, but the agriculturalist was entirely exempted from the payment of any occupation tax. In 1861 Texas undertook to secede from the Union. The convention, declaring for secession, framed a new Constitution, in which they embodied section 27, article 7, of the Constitution of 1845. It reads as follows:

"Section 27. Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exexempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, p. 247.

In 1866 another Constitution was framed. Article 7, section 27, of that instrument was made again to read as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, bottom of page 322.

In 1869, what was known as the Reconstruction Constitution of Texas, was adopted. Section 19, article 12, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in the State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the legislature may think proper to exempt from taxation. The legislature shall have the power to levy an income tax and to tax all persons pursuing any occupation, trade or profession; pro-

vided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical." Sayles' Texas Statutes, Vol. 4, p. 461.

Dissatisfied with this Constitution, the people of Texas, in 1875, made another in its stead, which was adopted in 1876, and is therefore called the Constitution of 1876. Section 1, article 8, of that instrument, so far as applicable, reads as follows:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation." Sayles' Texas Statutes, Vol. 4, bottom of page 557 and top of page 558.

Section 2, article 8, provides also that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void." Sayles' Texas Statutes, Vol. 4, top of page 559.

It will thus be seen that the court below was mistaken in assuming that the Texas Legislature in 1889 was inspired by the sinister purpose of pandering to the agricultural classes of that State. On the contrary, they were but following the beaten path marked out for them by the fathers nearly half a century before. They were but pursuing the fixed policy of Texas as outlined in every Constitution which its people had adopted from the date of the admission of that State into the Union. And another significant feature is that the first Constitution of Texas was adopted by the people who won its independence; the second Constitution was adopted by the people who sought to

secede and dissolve the Union; the third Constitution, of 1866, was adopted by those who, under the policy of President Johnson, sought to restore the State to its practical relations with the Union; the fourth Constitution was framed by those who under what is known as the "reconstruction laws of Congress" established a government; the fifth and last was made in 1876, when the Democratic party was again restored to power. I mention these facts for this purpose only, viz: to show that no matter what political party was in power in Texas—whether it was the revolutionists who had established its independence; whether it was the secessionists who sought to take it out of the Union; whether it was the followers of President Johnson who sought to establish it again in the Union; or whether it was the Republican party in the reconstruction days, or the Democrats just regaining their lost power, each of their Constitutions carried with it and in it the provision exempting the agriculturist from the payment of an occupation tax.

The provision of the Constitution of 1869, above quoted, was construed by the Supreme Court of our State, but it never occurred to the learned jurists then on that bench that the exemption was unconstitutional.

See Higgins v. Winkler, 47 Tex., pp. 383, 395.

This decision has been followed by the Court of Criminal Appeals of Texas in numerous cases.

Harris v. State, 4 App., 131.
Tonado v. State, 4 App., 325.
Langbell v. State, 4 App., 312.
Ex Parte Cooper, 3 App., 489.
Ex Parte Mabry, 5 App., 93.
Albrecht v. State, 8 App., 216.

In the last mentioned case Judge Clark in an admirable opinion maintained the law imposing an occupation tax on retail liquor dealers as constitutional. The portion of his opinion bearing upon this subject reads as follows:

"The class of subjects proposed to be taxed were retail dealers in spirituous, vinous or malt liquors, and the provisions of the law are made to apply to all such dealers within the limits of the authority levying the tax. That more money may be collected from one dealer than another does not destroy the equality or uniformity of the sys-

tem, within the meaning of the Constitution, but the tendency and effect is decidedly to the contrary. 'Perfect equality and uniform taxation will remain an unattainable good as long as laws and government and man are imperfect.' Approximation to this is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a tax is just and equal or not, is not a question of law. If it were, courts, by adopting a standard of rigid construction, might altogether put a stop to taxation; for no system ever devised, whether it related to a tax on property or on business, or a capitation tax, ever in its practical operations bore equally and uniformly on the same class of subjects. If there is such equality and uniformity as conforms to the standard provided in the Constitution, or reasonably deducible from it, it is all that can be required. Texas Banking and Insurance Company v. State, 42 Texas, 639; Youngblood v. Sexton, 32 Mich., 414; Cooley on Taxation, 124-127. Viewed in its twofold aspect, the law in question is free from objection on this account." Albrecht v. State, 8 App., 228.

It will be seen from the excerpts taken from the opinion, that the distinguished jurist speaking for the court, did not seem to understand that the provision in the Texas Constitution exempting agriculturalists from the operation of the occupation tax laws rendered all occupation taxes void, because taxes were not thereby uniform, and because it denied to some people the equal protection of the laws. Yet it must be clear to any mind that if the exemption of the agriculturalist from the payment of an occupation tax did not deny to those who were compelled to pay occupation taxes the equal protection of the laws, certainly the exemption of the agricultural classes from the police regulation contained in the anti-trust law cannot have that effect. It would be no credit to our State courts, either the Supreme Court or the Court of Appeals, to suppose for a minute that the Federal Constitution was forgotten, but whether it was or not, the provision in the State Constitution requiring all occupation taxes to be equal and uniform—that is, uniform as to the same classes upon which they operate—is precisely in accord with the construction which this court has given to the fourteenth amendment to the Federal Constitution. In Giozza v. Tiernan, this court also failed to find any objection to the occupation tax on whiskey dealers, although the occupation tax on whiskey dealers is regarded in part as a police regulation.

Giozza v. Tiernan, 148 U. S., 662.

From an examination of the authorities last above cited, it will be seen that the argument that the exemption of agriculturalists from the operation of the anti-trust law will render it invalid, has at least, the merit of novelty. It never suggested itself to the Supreme Court of Texas, nor to the Court of Appeals of Texas, notwithstanding the learning of the members of that court. It never suggested itself to this court when considering the several occupation tax cases brought here from the Texas courts. I have said that the exemption of this statute relates almost exclusively to agriculturalists; that is to say, to the producer of agricultural products, and to those who raise live stock. Although the western part of Texas is perhaps more adapted to stock raising than to farming, yet the fact remains that the larger portion of the live stock in Texas is owned by the farmers, and is raised by the farmers. This fact was brought out most clearly in 1884 by Judge Terrell, of our State, then State Senator, and recently Minister to Turkey, in a speech in the State Senate then printed.

Bearing in mind the purpose that the legislature had in view in passing this act it will not be difficult to understand why the exemption in question was made. Our Supreme Court in a well considered opinion, discussing the question of intention of the legislature in passing the act, was led to consider the following cases:

People v. North River Sugar Refining Co., 121 N. Y., 581.
State v. Cotton Seed Oil Trust, 40 La. Ann., 8.
Richardson v. Buhl, 6 Law Rep. Ann., 457.
People v. Chicago Gas Trust Co., 130 Ill., 268.
Rice v. Rockefeller, 8 Ry. and Corpt. Law Journal, 129.
Gould v. Head, 38 Federal Rep., 886.
State v. Nebraska Distilling Co., 8 Ry. and Corp. Law Journal, 23.
Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St., 173.
Arnot v. Coal Co., 68 N. Y., 558.
Santa Clara V. M. & L. Co. v. Hays, 76 Cal., 387.
Clancy v. Onondega Salt Co., 62 Barb., 395.
Craft v. McConoughy, 79 Ill., 346.
India Bagging Co. v. Kock, 14 La. Ann., 168.
Gibbs v. Baltimore Gas Co., 130 U. S., 396.

Texas Oil Co. v. Adoue, 83 Texas, 650.
Anderson v. Jett, 89 Ky., 375.

Referring to them the court said:

"The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the legislatures of several States sought to remedy by direct statutory enactments upon the subject. They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce, or the rates of transportation and intercommunication. The evils resulting from these operations were doubtless paramount in the minds of our legislators when they passed the statute under consideration, and it was to repress these practices that the law was enacted. By the 'plain import of its language' it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles." Ins. Co. v. State, 86 Texas.

It is always conceded that the interpretation given by the Supreme Court to a statute of its own State is binding on all other courts, in so far as the question of legislative intent is involved. (134 U. S.) It would seem, therefore, that the statement of the Supreme Court of Texas given on that point is conclusive. Bearing this in mind, it is clear that the purpose of the legislature was to protect the people of Texas against the combinations of capital who had obtained control of those commodities without which the community could not exist. To illustrate: The sugar trust was able to control the price of sugar. The oil trust was able to control the price of oil. The coal trust was able to fix the price of coal. The cattle trust, formed in New York, was able to fix the price of meat, especially beef. The gas trust could determine the price at which cities should be lighted. Cotton bagging trusts fixed the prices which farmers must pay for bagging in which to wrap their cotton. Indeed, everything was believed to be, and most commodities were, in the hands of combinations of capital, which were able to strike down all competition and control the entire Texas market. It must be remembered, too, that these trusts do not sell directly to the consumers. They do not retail out the food products, oils, coal, clothing, and other articles of prime necessity to the consumer, but the trusts sell to the dealers and the dealers sell to the consumers. It is well known that

the farmers and agriculturalists sell very little direct to the consumers. They sell their grain to the mills; their pork to the packery; their cattle to the cattle dealer, who in turn sells them in a foreign market. Their cotton is shipped to the mills of New England or Europe; their wool is likewise carried to the same place, and the food products, when thoroughly prepared for consumption, are returned to dealers who in turn sell to the consumers of the State. The same may be said of the finished manufactured products made out of raw material raised in Texas, sold to the factories by the agriculturalists and stockmen. It is plain, therefore, from the foregoing, that the agriculturalists and stock raisers of Texas, from the very nature and character of their business, are incapable of entering into agreements in restraint of trade, which would be injurious to the people of Texas: that is to say, inasmuch as the sales of their products are not made to the consumers but mainly to speculators and to dealers, who in turn sell them to people outside of the State, that no agreement that they would make would be hurtful to the people of Texas. Another fact, which the legislature doubtless had in mind, and which is known to all persons reasonably well informed, is that the farmers and stockmen of Texas cannot make and execute an agreement which would injuriously affect the people of Texas. Let it be granted, for the sake of argument, that they sell to the consumers (which they do not), it is well known that they are compelled to sell the products of their fields as soon as they can be reasonably prepared for market. They are compelled to sell their live stock as soon as they are old enough for market. The sale of the products of the farm and the live stock becomes a matter of prime necessity to them in order to pay the debts which they incur in the cultivation of their fields, and in order to enable them to procure supplies for the ensuing year. This condition is not peculiar to Texas. It is true of every agricultural section of country where there are no mines that are being operated, and few or no factories in existence.

The suggestion of the distinguished trial judge that there were such things in existence as swine breeders' associations, and farmers' alliances is without force. The legislature was not intending to prevent the existence of organizations of any kind,

but it was intending to prohibit contracts made by organizations and individuals which would operate in restraint of trade. What did it avail the distinguished trial judge to call attention to swine breeders' associations, farmers' alliances, or cattle raisers' associations unless he could show that the swine breeders' association undertook to control the price of pork, the cattle raisers' association the price of beef, or the farmers' alliance undertook to control the price of farm products. I presume he knew what everybody else knows, that no such effort has ever been made, and if made has proven abortive. Take for example the efforts that the Southern farmers made to restrict the number of acres planted in cotton. What was the result? The result has been, in every instance, to increase the acreage rather than to reduce it. Suppose that the farmers of the great West—the grain fields—have entered into agreements (which I deny) to fix the price of the products of their farms. Have they ever been able to execute them? Were such agreements ever made and executed by the farmers of the Northwest or of the middle West? The answer of every intelligent American citizen must be "No, they have never been able to execute any such agreement."

I repeat that it was not the purpose of the Texas Legislature to prevent farmers from organizing, stock men from organizing, swine breeders from organizing, nor lawyers from organizing. The distinguished jurist might as well have pointed to the Texas Bar Association, or the Texas Medical Association. It would have been just as pertinent to the issue. I repeat, the existence of farmers' alliances, of swine breeders' associations, of cattle raisers' associations, does not prove that they were undertaking to control the markets, or that there was any danger of their ever succeeding in controlling the markets, and therefore there was no necessity for the legislative enactment to include them. The idea of the Texas farmers controlling the price of a single farm product by agreement among themselves or with others is absurd. The idea of their undertaking to control the price of beef or pork is equally absurd. Every one knows that it is impossible for them to do it. Every one knows that they have never undertaken to do it, and if they were to undertake it they would make a most ridiculous failure. Competition between them renders it impossible. Their financial

condition is an unsurmountable obstacle to their successful control of these questions. Legislation becomes unnecessary, because it is useless to attempt to prohibit that which is impossible. But it is not so with dealers, as hereinbefore stated. They buy almost everything that the people of Texas consume from merchants and manufacturers controlled by trusts. The trusts that sell to them make two forms of contracts—sometimes they are blended in one.

1. They bind those who purchase from them to purchase exclusively from them.

2. They enter into agreements with the Texas dealers fixing the prices at which the Texas dealers will sell those commodities to their customers, and thus deprive the Texas merchant of the advantage of competitive dealers from whom he might purchase, and depriving the Texas consumer of advantages of competitive prices among Texas merchants. This is shown by the several Texas cases cited in this argument. It was proven, indeed it was admitted by the Waters Pierce Oil Company, in a trial recently had in the District Court of Travis County, Texas, between the State of Texas and that company, in which the permit of the Waters Pierce Oil Company (a foreign corporation), to do business in Texas was cancelled by the court, that the first class of agreements above mentioned had been entered into by it and the Texas dealers.

1. That the Waters Pierce Oil Company bound their customers to buy from them only. They were not permitted to buy from the Standard Oil Company of Ohio, or New Jersey, or any other oil company. They contracted away their right so to do.

2. It was proven in numbers of instances that they entered into contracts fixing the price of oils at which the Texas merchant should sell to his customers. The same distinguished counsel represents the Waters Pierce Oil Company in that case that represents appelles in this court, and they know the statements herein contained on this point are absolutely correct. Furthermore, it was proven in that case that the Waters Pierce Oil Company had entered into an agreement with various oil companies, which composed the Standard Oil Trust, and that no other company in what was known as the Standard Oil Trust competed with the

Waters Pierce Oil Company in Texas in the sale of illuminating oils. That much was admitted on the trial. The result was they destroyed all competition, because the trusts having fixed the prices the merchant must sell at those prices so fixed or else they cannot purchase from outside dealers. Or if they did not fix the selling price they had obligated themselves to purchase from no one except their vendors, thus bargaining away their right to buy their supplies in competitive markets. This is known to be true. This makes plain the purpose of the legislature in passing this law. It was to prevent this destruction of competition that the Texas statute was passed, and therefore it was not necessary to include within its terms any except those who were dealers, because if the dealers could be kept from entering into agreements in restraint of trade with the trusts from which they purchased, competition would be preserved in Texas and the individualism of the citizen would not be destroyed. This being the object and purpose of the legislature it would have been absurd and certainly unnecessary to have included the agricultural products while in the hands of the producer, and the live stock in the hands of the raiser, within the terms of the statute. It would have done no harm to have so included it, but it certainly would have done no good. But the moment these commodities become the property of a dealer, whether that dealer be a farmer or a merchant, the law applies to them. There was abundant reason for the discrimination. It was not arbitrary.

Because it was unnecessary, the remedial legislation is never called for except for the purpose of correcting existing evils, and there is no necessity for including within remedial legislation acts which are of themselves innocent, unless by leaving out those innocent acts it renders it impossible to prohibit the acts that are themselves hurtful. That was doubtless the reason why the terms of the act were made so comprehensive as to all matters not specifically exempted therefrom. Like the Federal statute, it related to all agreements, reasonable and unreasonable alike, because it is difficult to discriminate under existing conditions as to the contracts made in restraint of trade by dealers. They might make some that were harmless and others that were hurtful, but in opening the doors to permit harmless agreements to be made by dealers the danger was believed to be that it

would render it impossible to prevent the hurtful ones from being likewise consummated.

I submit, therefore, that the exemption can be maintained on the following grounds:

1. Because the object and purpose of the law was to prevent the Texas dealers, who supplied the masses of the people with the necessaries of life, from making contracts with trusts from which they purchased them, fixing the prices at which they should sell to their customers, or restricting them in their right of purchasing from others. In other words, the purpose of the statute was to compel the Texas dealers to sell at prices which they themselves would control, and thus secure competition to those who purchased from them, and to prevent their agreeing to restrict their right to purchase so as to secure competitive markets in which they might buy, and thus give the consumers at least the benefit of the competition in and out of Texas. The farmers not selling directly to the consumers but to dealers did not come within the reason of the rule.

2. Because the farmers of Texas were powerless and are still powerless to make and execute any agreement in restraint of trade in respect to products raised by themselves that would be hurtful to society.

Instead of being criticised for having passed this law the legislature ought to receive the commendation of all men who believe that the individualism of the citizen ought to be preserved and that competition in business ought not to be destroyed. The Supreme Court of Texas has taken this view of this question more than once. It has declared and repeatedly declared that this statute is constitutional.

Insurance Company v. State, 86 Texas.

Houk & Dieter v. Brewing Association, 88 Texas, 184-189.

Coal Company v. Lawson, 34 S. W. Rep. 919.

Brewing Company v. Templeman, 38 S. W. Rep., 27.

Fuqua v. Pabst Brewing Company, 38 S. W. Rep. 30.

The Supreme Court of Texas is cognizant of the conditions which existed there in 1889, and which still exist. The court is composed of judges who have spent the greater part of their lives in that State. If they believed that the discrimination in this statute was an arbitrary one and was without reason, un-

questionably they would have held the statute invalid. I do not mean to say that their conclusion upon that point should be conclusive in this court. I know that the contrary is true. But what I do mean to say is this, that every statute is presumed to be valid until the contrary is shown beyond a reasonable doubt. That is an elementary rule always recognized. That rule would be applied by this court if the statute in question had never been reviewed by the Supreme court of Texas. It seems to me that that presumption should be strenghtened in this case because the Supreme Court of that State, each of whose judges is cognizant of the conditions therein, have repeatedly held this statute valid.

The exemption of farm products in the hands of the producer and live stock in the hands of those who raised them from the operation of the law does not render it invalid, because the exemption is based on a sufficient reason and is in no sense arbitrary.

It is hardly necessary to call the attention of the court to another suggestion made by the trial judge in his opinion that the statute in question sought to give the courts of Texas extra territorial jurisdiction. He based his opinion on section 5 of the act. It reads as follows:

"Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

Manifestly the court did not discriminate in the construction of this section. It did not intend to authorize the courts of Texas to take cognizance of any offenses *committed outside of Texas;* but it did seek to give the State jurisdiction of *offenses committed in Texas* by people actually *outside* of her limits. That is no new law. It has always been recognized that a man's personal presence in a particular locality is never necessary to constitute him a criminal therein. It never becomes material to inquire where he was when he committed the crime. The important question is, *where was the crime committed?* As to whether he accused was within the limits of the State or not is

immaterial and never could be material in any case except where an extradition is sought; then it might be that no requisition could issue from one State unless the party was personally present in the State where the crime was committed and had fled from it, or had been in the State subsequent to the commission of the crime and had fled from it, but even then it is unimportant whether he was in the State at the date when the crime was committed or not, provided he committed it.

Ex Parte Reggell, 114 U. S.

Criminal Law Magazine, Vol. 3. p. 804.

Am. and Eng. Ency. of Law, Vol. 7, pp. 645, 646, subdivision 22, and authorities there cited.

Moore on Extradition, Vol. 2, Secs. 578-587.

But this question becomes immaterial because the trial court held that the section in question, even if void, could perhaps be eliminated and still leave the remainder of the act unaffected thereby.

The suggestion which the distinguished judge made that the act was intended to operate upon interstate commerce is equally unfounded. I have heretofore adverted to the rule which this court recognizes, that the decision of the Supreme Court of a State as to the construction put upon a State statute is always conclusive on this court. Or as this court has expressed it in a Minnesota case:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court for the purposes of the present case as conclusive and not to be re-examined here as to its propriety or accuracy." Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 456.

The question as to whether the act applies to interstate commerce has been called to the attention of the Texas Supreme Court more than once. In the case of the Texas Brewing Co. v. Templeman, 38 S. W. Rep., p. 28, the court in discussing the contract made on the basis of that suit, said:

"There is no question of interstate commerce involved in this case, and it is therefore apparent that the contract cannot be the foundation of a proper judgment."

In the case of Fuqua v. Pabst Brewing Company, 38 S. W. Rep., page 30, the court in discussing another contract, by the

terms of which beer was shipped from Milwaukee, Wis., to Amarillo, Texas, said:

"The parties contracted for the sale and purchase of beer to be transported from Milwaukee, Wis., to Amarillo, Texas, to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce and not subject to State regulation without the consent of Congress, nor did the statute (meaning the statute in question) *undertake in any way to regulate or prohibit same.* But the parties by the same contract voluntarily went further and so dealt with the subject after it had ceased to be an article of interstate commerce as to create a trust as above shown, in violation of the statute."

This opinion of the Supreme Court of Texas settles the question that the statute under discussion was not intended by the legislature to affect interstate commerce in any sense whatever. That construction being accepted by this court eliminates that question from the case, and the appellee is left to rest his case on the single proposition that the exemption of farm products in the hands of the producer and live stock in the hands of the raiser from the operation of the statute makes it invalid.

Recapitulation: Appellant insists on the following propositions:

1. That the writ of *habeas corpus* should not have been granted by the Circuit Court of the United States for the Northern District of Texas, and that in granting the same the court abused the discretion with which it was clothed.

2. That in no event ought the writ of *habeas corpus* to have been granted before a trial was had in the State court and judgment therein rendered.

3. That the appellant should have been remanded to the custody of the State court without reference to the validity of the statute upon which the charge was based.

4. That the statute is valid, and that none of the objections urged thereto can be maintained.

Appellant is anxious to secure the decision of this court upon the validity of the statute, for the reason that the State has so many cases pending depending upon this result, yet he respectfully submits that if appellant's contention as to the circumstances under which a writ of *habeas corpus* should be granted is correct,

that rule ought to be stated so clearly as to prevent any further conflict between the State and the Federal courts upon questions of this character.

Respectfully submitted,

M. M. CRANE,

Att'y for John W. Baker, sheriff, etc., appellant.